Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

201863

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Georgia's medical malpractice statutes of limitations/repose which mandate that a child must file a medical malpractice lawsuit prior to the age of majority denies the child equal protection and due process of law under the Fourteenth Amendment when Georgia law (a) otherwise recognizes that a child is incapable of protecting his or her own rights; (b) provides that a child lacks the capacity to sue in his or her own behalf; and (c) tolls the child's claims until age of majority, except in medical malpractice cases?

2. Whether the same statutes deny persons injured by medical malpractice due process and equal protection by barring claims based on latent medical negligence or latent injuries which are not discovered prior to the expiration of the prescribed time periods?

3. Whether the Supreme Court of Georgia's constitutional validation of these statutes is flawed when multiple state and federal courts have reached contrary results with respect to conceptually indistinguishable laws by employing the same "rational basis" analysis as Georgia courts or, alternatively, by applying "heightened intermediate scrutiny"?

LIST OF PARTIES

The parties are as shown in the caption of the case. The Board of Regents of the University System of Georgia includes the following: Hugh A. Carter, Jr.; William H. Cleveland; Michael J. Coles; Robert F. Hatcher; Julie Ewing Hunt; Felton Jenkins; W. Mansfield Jennings, Jr.; James R. Jolly; Donald M. Leebern, Jr.; Elridge McMillan; Patrick S. Pitlar; Doreen Stile Poitevint; Willis J. Potts; Wanda Yancey Rodwell; J. Timothy Shelnut; Benjamin J. Tarbutton; Richard L. Tucker; and Allan Vigil.

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OPINION BELOW

On February 27, 2006, the Supreme Court of Georgia, which has exclusive jurisdiction to hear appeals involving constitutional challenges to Georgia statutes,[1] declined to review petitioners' due process and equal protection challenges to O.C.G.A. §§ 9-3-71 and 9-3-73 under the United States and Georgia Constitutions. (Appendix A.) Those challenges to Georgia's medical malpractice statutes of limitations/repose had been rejected in two trial court orders dated September 19, 2005 and October 14, 2005, which granted partial summary judgment in favor of respondents based on these statutes. (Appendices C and D.) The latter order expressly denied the due process and equal protection challenges to the statutes raised in petitioners' brief in opposition to respondent Kaminer's motion for summary judgment.[2]

Petitioners' claims, which arose out of the failure to diagnose a child's AIDS condition, were eliminated or truncated by the statutes at issue despite the absence of any evidence that the petitioners had notice or knowledge of the AIDS condition prior to April 2001, just months before suit was filed in December, 2001. In the words of the trial judge: *"While this statute and its interpretation may be unfair or even absurd as it applies to cases such as this one, it is the law and we must apply it."* (emphasis added). Petitioners' claims then were limited to those injuries which occurred within two years of filing the complaint and those negligent acts which occurred within five years of filing the complaint. Petitioners appealed to the Supreme Court of Georgia based on the trial court's rejection of constitutional challenges to the statutes which limited their claims.

1. Ga. Const., art. VI, § 6, ¶ 2 provides:
The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases: (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law ... has been drawn into question.

2. Petitioners' Brief in Opposition to Kaminer's Second Motion for Summary Judgment, Section H timely raised the constitutional questions raised here.

The Supreme Court of Georgia declined jurisdiction and would not review the challenge, stating in its Order of February 27, 2006, that it had previously upheld these statutes against the same constitutional challenges.[3] It then transferred the case to the Georgia Court of Appeals for review of other issues. The Supreme Court of Georgia denied petitioners' timely motion for reconsideration on April 13, 2006, foreclosing further review of the constitutional issues raised by petitioners.[4] (Appendix B.)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Order of the Supreme Court of Georgia dated February 27, 2006, is a final decree as contemplated under 28 U.S.C. § 1257(a) because the Order forecloses further consideration of the Fourteenth Amendment challenge to the statutes in question. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Supreme Court of Georgia denied petitioners' motion for reconsideration of the Order on April 13, 2006. The Respondent Board of Regents has been represented throughout the Georgia proceeding by the Attorney General of the State of Georgia and that office has the requisite notice of petitioners' claims that Georgia's medical malpractice statutory scheme of limitations and repose is unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

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3. Citing *Smith v. Cobb County-Kennestone Hosp. Auth.*, 423 S.E. 2d 235 (Ga. 1992) (rejecting equal protection and due process challenges to minor's challenge of O.C.G.A. § 9-3-73) and *Crowe v. Humana*, 439 S.E. 2d 654 (1994).

4. The Supreme Court of Georgia cited and relied upon *Zepp v. Mayor & City Council of the City of Athens*, 339 S.E.2d. 576 (Ga. 1986), the premise of which is that the court will not entertain jurisdiction of cases calling into question constitutional provisions which it has previously decided. This determination is binding on the Court of Appeals and forecloses its consideration of the constitutional questions raised. *See Egerton v. Jolly*, 212 S.E.2d 462 (Ga. Ct. App. 1975). The Court of Appeals recognized in an earlier Order entered November 2, 2005 that only the Supreme Court of Georgia had jurisdiction to hear the constitutional appellate issue (Appendix E).

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 9-3-71. General limitation:

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-73. Certain disabilities and exceptions applicable:

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter[5] in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the

5. The chapter includes O.C.G.A. § 9-3-90, which recognizes that minors are otherwise legally incompetent and under a disability until the age of majority. Hence, their claims are tolled until the age of majority.

periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of mental retardation or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor: (A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or (B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by Code Section 9-3-72.[6]

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians,

6. O.C.G.A. § 9-3-72 provides that "the limitations of Code section 9-3-71 shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission is discovered. . . ." This statute is challenged as well because it allows a discovery rule for surgical patients and no others. The statute also cross references O.C.G.A. § 9-3-71.

preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989.

O.C.G.A. § 9-3-90. **Persons under disability or imprisoned when cause of action accrues.**[7]

(a) Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

STATEMENT OF THE CASE

Derek Canas, born November 1, 1984, contracted HIV from a contaminated blood transfusion during infant heart surgery at the Medical College of Georgia ("MCG") hospital in the first quarter of 1985, shortly before the FDA approved and implemented a blood screening test for HIV. The surgery compromised the heart's natural pacemaker, requiring a second procedure to implant an artificial pacemaker. Derek had two later surgical procedures for pacemaker replacements at MCG, the last in February of 2000.

Derek Canas was continuously seen and monitored by the pediatric cardiology department at MCG, the last ten years by respondent Kaminer.[8] Kaminer was an employee of the respondent Board of Regents, which operated the hospital until

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7. This statute is not challenged, but is set out because it applies to minors' claims, except in medical malpractice cases.

8. Kaminer saw Derek on 16 occasions from May 17, 1991 through February 15, 2001.

July 2000, when respondent MCG Health, Inc. assumed responsibility for hospital and clinic operations. Kaminer routinely reported her examinations and findings by letter to Derek's local pediatrician, respondent Al-Jabi. Derek was followed by Al-Jabi from 1993 through March 15, 2000, on 39 visits, exclusive of more than 20 trips to the local hospital's emergency room, many of which also involved contact with Al-Jabi.

On each occasion that he was seen by Al-Jabi for a variety of serious childhood illnesses, including pneumonia, tooth decay requiring surgery, herpes-like sores in the mouth, bronchitis, irritable bowel syndrome, swollen lymph nodes and diarrhea, Derek had undiagnosed HIV or AIDS. Likewise, each time that Derek saw Kaminer for examination and cardiac monitoring, he had undiagnosed HIV or AIDS.

By the year 2000, as noted by Kaminer, Derek Canas was 15 years old, 4 feet 2 inches tall, and weighed 58 pounds. His stunted growth resulted from AIDS, although the family was told incorrectly and repeatedly by the respondents that it was a by-product of the congenital heart condition. When Derek's upper respiratory condition worsened in 2000, he was referred to a local pulmonary specialist. This doctor, who was concerned about the child's growth, referred him to the endocrinology department at the University of Florida's Shands Hospital. Following several months of medical investigation there, an HIV blood test was performed and in April 2001, the correct diagnosis was made.

The complaint in this case was filed against the respondent doctors on December 28, 2001, within 9 months of the AIDS diagnosis, and within two years of Derek's last treatment by either doctor. On November 1, 2002, Derek turned 18, the age of majority in Georgia, from which followed a stipulation allowing him to proceed *sui juris*. The complaint was later amended to add the successive owners and operators of MCG Hospital (Board of Regents until July 1, 2000, and MCG Health, Inc. thereafter) on February 7, 2003, following required *ante litem* notice and within two years of Derek's last visit to Kaminer at MCG. All respondents were sued within two years

of discovery that Derek had AIDS in April 2001 and within five years of some, but not all, negligent errors and omissions.

Respondents each moved for summary judgment based on Georgia's medical malpractice statutes of limitations/repose. Petitioners argued in the trial court that these statutes were unconstitutional facially and if applied to truncate or time bar petitioners' claims. On September 19, 2005, the trial court entered an Order granting partial summary judgment to the respondents under O.C.G.A. § 9-3-71, barring petitioners' medical malpractice claims for those wrongful acts which occurred more than five years before the filing of the complaint and for those injuries to Derek which occurred more than two years before the filing of the complaint. This ruling was made in the face of uncontradicted evidence that, until the AIDS diagnosis in April 2001, the petitioners had no knowledge that Derek had gone through his entire childhood with HIV/AIDS, no knowledge of any medical error, and no knowledge that Derek's myriad illnesses and injuries were either exacerbated by, or attributable to, undiagnosed HIV/AIDS.[9] In a later and separate Order of October 14, 2005, the

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9. The Human Immunodeficiency Virus (HIV) is transmitted by direct blood-to-blood contact or by sexual contact with an infected individual. Levine, *Acquired Immunodeficiency Syndrome: The Facts*, 65 S.Cal.L.Rev. 423, 427 (1991). Once a person becomes infected with HIV, the virus attaches itself to T4 cells which are responsible for immune function in humans. *Id.* The virus then multiplies and impairs the immune system, ultimately allowing other infections to occur far more frequently than normal, with devastating effects. Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 Hofstra L.Rev. 37, 44 (1989). Once a person has been infected with HIV, the virus begins to incubate over time. Thus, although a person infected with the virus may remain asymptomatic and may appear well in all respects, the virus continues to affect the host's immune system until it becomes so depressed that a limitless number of life-threatening infirmities may occur. Levine, *Acquired Immunodeficiency Syndrome: The Facts*, 65 S.Cal.Rev. at 429. The period in which the virus incubates is indeterminate. It may be as short as one year and can extend as long as fourteen years. Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 Hofstra L.Rev. at 44 n.38; Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective*

(Cont'd)

trial court expressly affirmed the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, rejecting petitioners' equal protection and due process challenges.

On February 27, 2006, the Supreme Court of Georgia, vested with exclusive jurisdiction to hear appeals involving constitutional attacks on Georgia statutes, declined jurisdiction in this case holding *sua sponte* and without benefit of briefs that the constitutional challenges of petitioners to O.C.G.A. §§ 9-3-71 and 9-3-73 on equal protection and due process grounds had already been decided adversely to petitioners in prior decisions, precluding further constitutional review.

In their timely filed motion for reconsideration, petitioners urged that (1) in prior review of these statutes, while articulating a "substantial relation" test, the Georgia Supreme Court nonetheless had improperly applied a rational basis test in affirming their constitutionality under the equal protection and due process of clauses of the Fourteenth Amendment of the U.S. Constitution and of the Georgia Constitution; (2) other state supreme courts and federal courts had invalidated similar statutes under both rational basis and heightened intermediate scrutiny analysis; and (3) the statutes could not be constitutionally or rationally conformed to other Georgia statutes which protect the rights of minors, toll their claims in other contexts until the age of majority, and acknowledge that minors are incapable of protecting themselves.[10] In short,

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(Cont'd)

AIDS, 45 Wash. & Lee L.Rev. 185, 186 n.4 (1988). Because of its inherent latency, HIV will likely be undetected for a long period of time. Thus, in cases such as this, where HIV has been transmitted through a blood transfusion, the discovery rule is particularly applicable since the prospective plaintiff will have no indication that he carries the virus. *Murray v. Hamot Medical Center*, 633 A.2d 196, 200 (Pa. 1993).

10. O.C.G.A. § 1-2-8 provides that minors are incapable of protecting their rights. Infants must sue through a guardian or next friend, and the law recognizes that a parent or nearest relation may neglect to protect the infant's rights. *See Sanders v Hinton*, 156 S.E. 812, 815 (Ga. 1931). A minor's suit not brought through a guardian or next friend is an amendable defect in the record. O.C.G.A. § 9-2-28. Claims of minors are tolled until the age of majority. O.C.G.A. § 9-3-90 (except in medical malpractice cases). The age of majority in Georgia is eighteen. O.C.G.A. § 39-1-1.

petitioners argued that all claims of Derek Canas should be tolled until he reached the age of majority on November 1, 2002, or, alternatively, until he discovered that he had AIDS in April 2001, and because the statutes in question do not so allow, they are unconstitutional. This motion for reconsideration was denied on April 13, 2006. The motions, briefs and pleadings upon which this statement of the case is based are currently in the record on file with the Georgia Court of Appeals.

REASONS FOR GRANTING THE PETITION

Medical malpractice statutes of limitations and repose in Georgia and in numerous other states override tolling statutes which recognize that minors are incompetent or unable to vindicate their rights. The statutory scheme at issue here is widely replicated and the constitutional analysis of it across the nation is uneven and conflicted. O.C.G.A. § 9-3-71 produces manifestly unjust and arbitrary results because the repose period is triggered by a medically "negligent act" which Georgia courts have recognized is not routinely known to the patient and the limitations period is triggered by an "injury" which may also be unknown to the patient. O.C.G.A. § 9-3-73 enacted two years later then divested children of the protection of a law which otherwise tolls their claims until age of majority. This challenged statute, for example, forces infants to sue for medical injuries by their seventh birthday when most are unable to communicate medical concerns effectively and none have the legal capacity to sue.

When confronted with constitutional challenges to conceptually indistinguishable statutes, state and federal courts in some jurisdictions have determined that such statutes deny equal protection or due process of law under those clauses in the Fourteenth Amendment or like provisions in state constitutions.[11] Georgia is among other states reaching a

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11. *See, e.g., Austin v. Litvak*, 682 P.2d 41 (Colo. 1984), invalidating both statute of repose and limit of discovery rule to foreign object cases under state rational basis equal protection analysis tracking federal analysis: "[I]n both 'foreign object' and 'negligent misdiagnosis' cases the injured persons are wholly innocent and may, through no fault of their own, fail to discover their injury prior to the running of the statute of limitations." *Id.* at 52-53.

contrary conclusion. The contradictory and irreconcilable constitutional results among the states often depend upon whether the medical malpractice statutory scheme receives heightened intermediate scrutiny or the "rational basis" analysis employed in Georgia.

A sampling of decisions from Texas, Ohio, Colorado, New Hampshire and others repudiating Georgia's constitutional position is provided hereinafter. This Court should grant the writ of certiorari to resolve the conflict; otherwise, the same statutory scheme which fails Fourteenth Amendment analysis elsewhere paradoxically comports with equal protection and due process in Georgia — an anomaly which the Fourteenth Amendment cannot countenance.

O.C.G.A. § 9-3-73 was held to override the general statute tolling minors' claims and survived a Fourteenth Amendment equal protection and due process challenge in *Smith v. Cobb County-Kennestone Hospital Authority*, 423 S.E.2d 235 (Ga. 1992). The current version of O.C.G.A. § 9-3-71 also survived an equal protection challenge in *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993). Both statutes survived a further Fourteenth Amendment challenge in *Crowe v. Humana*, 439 S.E.2d 654 (1994). These decisions, which foreclosed petitioners' challenge, employed "rational basis" constitutional analysis.

In *Craven, supra* three of the seven justices dissented and would have invalidated O.C.G.A. § 9-3-71(b) under a heightened "intermediate scrutiny" test instead of the majority's rational basis test, finding that the right to sue for personal injuries is "an important substantive right," and urging the analysis employed by the New Hampshire Supreme Court, which invalidated a conceptually indistinguishable statutory scheme in *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). The *Craven* dissent would have employed heightened scrutiny analysis, not because the claimant was a minor, but because the statute restricted patients' rights to sue for personal injuries when compared to the rights accorded other personal injury claimants.

These Georgia decisions cannot be constitutionally reconciled with the strictures of the Fourteenth Amendment

or Georgia precedent which in *Shessel v. Stroup*, 316 S.E.2d155 (Ga. 1984), invalidated the earlier 1976 version of O.C.G.A. § 9-3-71 on equal protection grounds. Exactly like the current five year period of repose embodied in the same code section, the earlier version of the law (a limitations statute with no "repose" provision) barred medical malpractice claims filed more than two years after the pertinent *negligent act*. *Shessel* determined that the statute was a denial of equal protection because some medical claims did not give rise to a manifest injury until more than two years after the antecedent negligent act.

The current statutes also present a constitutional conflict with other Georgia limitation laws because only in medical malpractice cases does a statute of limitations or repose begin to run from the date of an undiscovered negligent act. *Simmons v. Sonyika*, 614 S.E.2d 27 (Ga. 2005).[12] Unlike these laws, the general statute of limitation for injuries to the person is two years from when the "right of action accrues" under O.C.G.A. § 9-3-33 (as had been the case for medical malpractice actions prior to 1976) upon which is a judicially engrafted discovery rule.[13] A statutory discovery rule in O.C.G.A. § 9-3-72 obtains only in surgical cases where a foreign object is left in the patient. *Simmons* held that non-discovery of the negligent act will not toll the statute. *Id.* at 29. Denuding these statutes of a discovery rule applicable to non-medical limitations is arbitrary, unconscionable and denies due process because patients, particularly minor ones, lack the competence and the education to discern when a medically negligent act has occurred, and children have no ability to ensure the protection of their rights by age seven or ten, as O.C.G.A. § 9-3-73 prescribes. The holding in *Simmons* and the refusal by the Supreme Court of Georgia to entertain any further

12. Georgia a has ten year statute of repose for injuries arising from a defect in building triggered by the date of "substantial completion" and a ten year statute of repose in a product liability case triggered by the date of first sale. These triggers are readily discernible to a lay person and distinguishable from a trigger premised on a medical provider's negligent act.

13. *See Welch v. Celotex Corp.*, 951 F.2d 1235 (11th Cir. 1992) (applying Georgia law); *King v. Seitzingers, Inc.*, 287 S.E. 2d 252 (Ga. Ct. App. 1981)

constitutional challenge to these statutes effectively leaves many patients, mostly children, with no rights or remedies for medical negligence, denying them equal protection and due process of law.[14]

I. Review is Warranted Since the Challenged Statutes Violate the Fourteenth Amendment By Mandating that Minors Sue for Medical Malpractice when Georgia Law Otherwise Recognizes that Minors are Incapable of Protecting Their Own Rights, Lack the Capacity to Sue, and Have Their Claims Tolled Until Age of Majority.

A. Georgia's Constitutionally Flawed Statutes in Historical Context .

For personal injury causes of action, Georgia employs a two-year statute of limitation which commences when the cause of action "accrues."[15] That statute embraces the concept of a continuing tort[16] and has been held not to commence until the plaintiff both discovers his or her injury and the causal connection to defendant's conduct. *See Welch v. Celotex Corp.*, 951 F.2d 1235 (11th Cir. 1992) (applying Georgia law).

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14. By way of contrast, the Indiana Supreme Court in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) held that state's medical malpractice statute of limitations unconstitutional in application to an undiagnosed breast cancer patient whose disease remained latent for longer than the statutory period. The court stated: "The Framers of our Constitution would have concurred with Justice Jerome Frank's Alice-in-Wonderland notion on the absurdity of applying a medical malpractice statute of limitations in cases such as this. . . ." *Id.* at 1283 n.12. The Supreme Court of Georgia has persistently refused to entertain constitutional challenges to these statutes and this Court declined to hear an intermediate scrutiny challenge in a fetus wrongful death case in 1997, which did not raise the constitutional argument as applied to minors and when the only conflicting out-of-state case cited was *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). *See Thompson v. Long*, 484 S.E.2d 666 (Ga. App. Ct. 1997), *cert. denied* by Supreme Court of Georgia (unpublished opinion), *cert. denied*, 522 U.S. 1147 (1998).

15. O.C.G.A. § 9-3-33.

16. *See Everhart v. Rich's, Inc.*, 194 S.E.2d 425 (Ga. 1972). Petitioners argued that the continued failure to diagnose AIDS was a continuing tort. However, the Supreme Court of Georgia has also foreclosed the application of the analogous continuous treatment rule to extend the statute of limitations in continuing mis-diagnosis cases in *Young v. Williams*, 560 S.E. 2d 690 (Ga. 2002).

Different limitations legislation for medical malpractice cases appeared in Georgia in 1976, but the law did not survive constitutional challenge in *Shessel*, where the court applied a "substantial relation analysis" but then commingled it with "rational basis" equal protection analysis. The court cited *Reed v. Reed*, 404 U.S. 71, 76 (1971) as support for the test applied.[17] Earlier, in *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981), the court had differentiated the "substantial relation to an important governmental objective" test from the "rational basis" test, suggesting clear delineation of heightened intermediate scrutiny equal protection analysis. The court in *Shessel*, while invoking "substantial relation" verbiage, did not recite *McDaniel* or refer explicitly to "intermediate scrutiny."

The 1976 version of O.C.G.A. § 9-3-71 invalidated by *Shessel* under the equal protection clause had a two-year limitation which commenced on the date of the physician's "negligent act or omission," instead of when the cause of action accrued, the prior rule in Georgia for all personal injury cases including medical malpractice.[18] That version of the statute contained no "repose" provision. Medical malpractice claims for minors remained tolled until the age of majority, as was the case in other tort contexts.

In the aftermath of *Shessel*, O.C.G.A.§ 9-3-71 was amended in 1985 to its current version which starts the limitation period from the date of "injury." However, the legislation added a new five year statute of "repose," which, just like the former statute of "limitations," was triggered by a negligent act or occurrence. So, the new statute of "repose" was conceptually identical to the old constitutionally infirm statute of "limitations," only it changed the limitation period from two to five years.

In 1987, Georgia then passed O.C.G.A. § 9-3-73, which for the first time imposed a laddered scheme of limitations/repose on children, requiring infants under five to sue for injuries within

17. *Reed* invalidated an Idaho statute which discriminated based on gender. The Court stated that "a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" 404 U.S. at 76.

18. *See*, n.15 *supra*.

two years of their fifth birthday and a statute of repose for the same children tied to their tenth birthday. This statute was held to trump the general tolling provision for claims of minors in O.C.G.A. § 9-3-90. *Smith*, 423 S.E.2d at 238. The repose provision also was held not to toll medical negligence until discovered, and survived the constitutional equal protection challenge. The court recited the words "substantial relation to the object of the legislation," but then employed the rational basis test. *Id.*[19]

When next confronted with a challenge to the five year statute of "limitations," now called a statute of "repose," the Supreme Court of Georgia again upheld the current statute. *Craven, supra* at 309. The "substantial relation" words invoked in *Shessel* were repeated, but the rational basis test was employed. The majority recognized only a two-tiered constitutional analysis, having forgotten *McDaniel*. "Intermediate scrutiny" was treated as a new idea in the dissent and remains in Georgia an elusive, unemployed curiosity.

Justice Benham, who wrote the dissenting opinion in *Craven*,[20] *sua sponte* suggested that an intermediate level of scrutiny should be employed, citing *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). Applying heightened intermediate scrutiny, the dissenting justices would have stricken the statute of repose as a violation of Fourteenth Amendment equal protection, viewing it as unreasonable and arbitrary because acts of medical negligence might not be manifest in five years. *Id.* at 312. Again, *Shessel* was not invoked as precedent for that test by anyone on the court, nor was *McDaniel* mentioned either. The majority decided that since the patient was not in a "suspect" class, the rational basis test applied instead of the "strict scrutiny" test, viewed as the only alternative. *Id.* at 310.

The dissent was also without reference to the age/minor issue; rather, it focused on how the statutes curtail the rights of patients to sue, "an important substantive right."[21] Had the

19. *Accord, Crowe v. Humana*, 439 S.E. 2d 654 (Ga. 1994).

20. Justices Hunstein and Sears also dissented, resulting in a 4-3 majority opinion.

21. *Cantrell v. Thurmond*, 499 S.E.2d 416, 421 (Ga. Ct. App. 1998) held that the right to medical care is a "fundamental right," arguably supporting heightened scrutiny for statutes denying redress where competent medical care is not provided.

Craven court acknowledged that "substantial relation" meant "heightened intermediate scrutiny," per *McDaniel*, the outcome should have been a unanimous decision invalidating the challenged statutes.

By changing the label from "limitations" to "repose" and extending the time limitation from two to five years, what had been irrational to the Supreme Court of Georgia became rational. By foreclosing further constitutional challenge to these statutes in its Order of February 27, 2006, and by holding in *Simmons, supra*, that these statutes run even without discovery of the negligent act, Georgia continues to leave many patients, mostly children, without any rights or remedies for medical negligence and at a constitutional dead end. Patients with AIDS, cancer and any number of other progressive diseases may not evidence a substantive injury within two years nor be able to discern a latent medical error within five years.

B. The Analysis in *Smith v. Cobb County-Kennestone Hosp. Auth.* Should Not Have Foreclosed Constitutional Scrutiny in this Case .

The *Smith* decision, invoked by the Georgia Supreme Court to bar constitutional consideration of petitioners' claims, cannot be reconciled with that court's prior declaration in *Shessel* that the 1976 version of O.C.G.A. § 9-3-71 was an unconstitutional denial of equal protection because the limitation period ran from the date of the negligent act and the negligent act was undiscovered during the statutory period. The resultant injury in *Shessel* did not even occur until after the period expired. Thus, the former law – which on its face would have barred the claim in *Shessel* before any injury or damage occurred – was an unconstitutional denial of equal protection. In support of its holding, the court observed that under the general personal injury statute of limitations the time for filing an action did not begin to run until the cause of action accrued on the date of injury. The fact that the legislature now called a once constitutionally infirm statute of limitations a statute of "repose" was inexplicably sufficient in *Smith* to cure the infirmity.

The court in *Smith* then decided that the due process rights of children were adequately safeguarded under O.C.G.A. § 9-3-73 because a next friend or representative could bring the suit under O.C.G.A. § 9-11-17(c). The court ignored its historical recognition that a parent or next friend might neglect to protect the infant. *See Sanders v. Hinton*, 156 S.E. 812, 816 (1931). The referenced statute, while requiring a parent or guardian to be appointed in a child's lawsuit, does not require that a parent or guardian actually bring such a lawsuit on behalf of a child. It does not bridge the mandate of O.C.G.A. § 9-3-73, which forfeits the child's medical malpractice right of action if it is not brought within the prescribed time limitation. The *Smith* decision did not even advert to O.C.G.A. § 1-2-8, which provides that minors are incapable of protecting their rights.[22]

Smith also ignored Georgia cases which further undermine its analysis. In 1854, the Georgia Supreme Court held that "no court before which the statute of limitations may be relied on, shall be permitted to construe it against . . . infants." *Bush v. Lindsey*, 14 Ga. 687, 688 (1984). In *Barnum v. Martin*, 219 S.E.2d 341 (Ga. Ct. App. 1975), the court made plain that limitations will not run against a minor even if represented in litigation by a next friend or guardian *ad litem*. The failure of a guardian to protect the interest of a minor will not operate to the prejudice of the minor. *Monroe v. Simmons*, 12 S.E. 643 (Ga. 1890). *Smith* does not, because it cannot, answer how children who are incompetent and incapable of protecting their rights in other civil matters became competent and capable of doing so in medical malpractice cases.

Finally, the *Smith* decision's flawed "rational basis" equal protection analysis concludes that a separate classification for minors is rational to protect against stale claims. Yet, in *Clark v. Singer*, 298 S.E.2d 484 (Ga. 1983), the court as in *Shessel* found the former version of O.C.G.A. § 9-3-71 to be unconstitutional

22. Nor did the *Smith* court consider O.C.G.A. § 9-11-9.1, which imposes a further barrier to the rights of minors/patients by imposing an expert affidavit requirement to establish a medical act or omission as a condition precedent to a claim under Georgia law. This latter statute underscores the fact that for a patient to even assert a claim for medical negligence requires the professional analysis of another doctor.

under the Fourteenth Amendment because it barred a wrongful death claim where the act of medical negligence occurred more than two years prior to death, while claims for wrongful death due to other causes could be brought within two years of the death. The court found that the purpose of statutes of limitations was to avoid slumbering claims by putting defendants on notice through the filing of a lawsuit within the prescribed period. The court held that a claim which had not yet arisen *"has not been slumbering and is not stale."* (Italics added.) *Id.* at 485. Differentiating wrongful death medical cases from other civil death cases was thus irrational and denied equal protection of the law.

The cases invalidating the earlier version of O.C.G.A. § 9-3-71 and validating the current statutes provide antithetical and irreconcilable constitutional analysis. By approving a legislative name change from "limitations" to "repose," and by vesting patients and children with notice of undiscovered medical negligence when they have none, slumbering claims became stale even before they could be brought. Due process and equal protection in Georgia medical negligence cases became constitutional relics.

II. Review is Warranted Because the Georgia Medical Malpractice Statutes of Limitations/Repose Are Held to Run Even Where the Patient Has Not Discovered Either the Negligent Act or the Resultant Injury.

Georgia affords a statutory discovery rule only to surgical patients who have foreign objects left in them. O.C.G.A. § 9-3-72.[23] Had a clamp been left in Derek Canas during heart surgery in 1985 (as opposed to the HIV virus) and been discovered in April, 2001, his right of action against the surgeon would be fully protected.

While a statute of repose on occasion is triggered by an event which takes place before a cause of action accrues, the complexities of medicine do not routinely make plain the triggering medical error or omission. Patients, particularly infant ones, cannot interpret lab results, blood work, MRIs or

23. This statute is incorporated by reference into O.C.G.A. § 9-3-73. The previous indistinguishable version of this "foreign object" statute was held constitutional against equal protection and due process attacks in *Allrid v. Emory University*, 285 S.E 2d 521 (Ga. 1982).

CT scans. The doctor, not the patient, is the repository of the telltale medical record. This Court has recognized that in the context of medical malpractice, a patient's ignorance of his legal rights should not prevent the running of a statute of limitations, but ignorance of the fact of his injury or its cause stands on different footing. *See United States v. Kubrick*, 444 U.S. 111, 119-122 (1979). These same precepts apply to torts in Georgia, except those involving medical malpractice.[24]

This Court also has held in the context of the Federal Employers Liability Act, that statutes of limitations are presumably not intended to attach to "blameless ignorance," but rather contemplate the assertion of claims within a specified period of time after "notice" of the invasion of legal rights. *Urie v. Thompson*, 337 U.S. 163, 170 (1949).[25] The Georgia statutes run in spite of blameless ignorance and in the absence of notice to the patient of the medical error. *Simmons*, 614 S.E. 2d at 29.[26]

Another line of Georgia appellate decisions holds that in a mis-diagnosis case, the mis-diagnosis is not only the negligent act, but also the "injury," rather than the subsequent discovery of the correct diagnosis.[27] The trial court's orders

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24. *See* n.13 *supra.*

25. *Id.* at 168-71 (declining to construe statute of limitations to bar a claim which asserted that the inhalation of silica dust resulted in silicosis, because to bar the suit would be to require the claimant to file a claim during the limitations period and before the symptoms were apparent and would be to charge the claimant with knowing the "inherently unknowable," that is, "the slow and tragic disintegration of his lungs"); *see Burgess v. United States*, 744 F.2d 771, 773 and 774 n.5 (11th Cir. 1984) citing Restatement (2d) of Torts § 889, comment e, p. 444-445 (1979) (limitation should not run where plaintiff has no knowledge of the injury) "the character of the injury will frequently prevent knowledge of what is wrong, so the plaintiff is forced to rely upon what he is told by the physician . . ."

26. *Accord, Crowe v. Humana*, 439 S.E.2d 654 (Ga. 1994).

27. *See Kane v. Shoup*, 580 S.E.2d 555 (Ga. Ct. App. 2003); *see also Hughley v. Frazier*, 562 S.E.2d 821 (Ga. Ct. App. 2002); *Oliver v. Sutton*, 540 S.E.2d 645 (Ga. Ct. App. 2000); *Frankel v. Clark*, 444 S.E.2d 147 (Ga. Ct. App. 1994); *Zechman v. Thigpen*, 437 S.E.2d 475 (Ga. Ct. App. 1993).

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below completely ignored the petitioners' lack of notice or knowledge that Derek Canas had AIDS prior to April 2001. The statutes of limitations and repose were applied by counting backward the requisite number of years from the filing of the complaint (two year for injuries, five years for negligent acts) without reference to the minority of Derek Canas or his family's ignorance of the malpractice continuum or resultant injuries.

Applying a discovery rule for personal injury cases generally and to foreign object medical malpractice cases, while stripping that concept from other medical cases, is at odds with precepts of due process or equal protection. New Hampshire invalidated its statute which allowed a discovery rule only in foreign object cases in *Carson*, as did Colorado in *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); other states have found constitutional shortcomings in special medical statutes of limitations which lack a discovery rule to protect latent claims.[28]

III. Review is Warranted Because There is No Uniformity Among State and Federal Courts Concerning the Constitutionality of Similar Medical Malpractice Statutes Or Whether Heightened Constitutional Scrutiny Should be Applied.

A. The Due Process Conflict.

In *Jaramillo v. Heaton*, 100 P.3d 204 (N.M. Ct. App. 2004), *cert. denied*, 101 P.3d 807 (N.M. 2004), the New Mexico Court of Appeals held that a medical malpractice statute of repose which required a minor subjected to malpractice before the age of six to bring a claim by his or her ninth birthday violated the due process clause of the Fourteenth Amendment. New Mexico, like Georgia, otherwise recognized that minors were

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By way of contrast, under California law the injury in an AIDS case has been held to be the discovery of the condition through a positive HIV test. *See Katz v. Children's Hosp. of Orange County*, 28 F.3d 1520 (9th Cir. 1994) (invalidating portion of California medical malpractice statute of limitations as discriminating against minors under rational basis analysis).

28. *See, e.g., Katz* (California), *supra* n. 27; *Martin* (Indiana), *supra* n.14.

incompetent or disabled until age of majority. The court's rationale included consideration of whether the statute accorded the minor child adequate notice and time to bring a claim. The Georgia statute of repose, triggered by a negligent act or omission, provides no right or remedy at all if the resultant injury does not become manifest until after the time period has expired. Patients, particularly minor ones, routinely have no notice of a doctor's negligent act nor notice prior to diagnosis of a resultant latent injury in progressive disease cases such as cancer or AIDS.

As the New Mexico court noted, a parent is permitted to make the child's health care decisions, but is not required to bring a cause of action on the child's behalf. Forcing a child to bring an action by age nine, even if the child had a competent parent or guardian unreasonably did not assure time for filing suit to protect the child's rights.

In *Smith*, the Georgia Supreme Court upheld O.C.G.A. § 9-3-73, employing what it called "procedural" due process analysis and reaching a conclusion which is a direct contradiction to New Mexico's conclusion that a conceptually identical statute denies due process under the Fourteenth Amendment.[29] Georgia's superficial analysis decided that because a parent or guardian might act to preserve the child's claim, due process was satisfied.

B. The Equal Protection Conflict .

In *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S. D. 1989), the Supreme Court of South Dakota held unconstitutional on equal protection grounds a statutory scheme which required a minor of less than six years of age to bring an action within two years of his sixth birthday. The South Dakota court held

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29. Federal due process requires a non-criminal statute to have language which conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and or practice. *See, e.g., Horn v. Burns and Roe*, 536 F.2d 251, 254 (8th Cir. 1976) (citations omitted). Substantive due process is a guaranty against arbitrary or unreasonable legislation which must have a substantial relation to the object sought to be obtained. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir 1976), *aff'd*, 430 U.S. 651 (1977). Patients routinely lack notice of "negligent acts" and often suffer latent "injuries" from them. Thus, simple words in the statutes are vague, and arbitrary when applied.

that the medical malpractice statutory scheme created an arbitrary classification of minors who had medical malpractice claims as opposed to minors with any other kind of tort claim. It struck down the statute using the rational basis test. The proffered legislative rationale for the South Dakota statute was substantially the same as the rationale recited in O.C.G.A. § 9-3-73(f). In *Austin, supra*, the Colorado Supreme Court agreed that a three year medical malpractice statute of repose did not satisfy state rational basis equal protection analysis in latent negligent mis-diagnosis cases.

C. Other States Also Have Concluded That Similar Laws Do Not Withstand Due Process or Equal Protection Analysis .

Texas, Arizona, Utah and Ohio, by way of further example, have all stricken medical malpractice statutes of limitations or repose, which trump tolling provisions otherwise protecting minors, employing due process or equal protection analysis.[30] While these results are sometimes reached under state constitutions, most states, including Georgia, have constitutional due process and equal protection provisions which parallel the Fourteenth Amendment.

Virtually all of these statutes are justified upon the same grounds recited in O.C.G.A. § 9-3-73(f). In many of these cases, the legislative rationale for the statutes, to wit, an alleged medical malpractice crisis or rising insurance premiums, etc., has been analyzed and repudiated.[31] Elimination of "stale

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30. *See Sax v. Votteler*, 648 S.W.2d 661, 666-67 (Tex. 1983); *Kenyon v. Hammer*, 688 P.2d 961, 976 (Ariz. 1984); *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993); *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983); and *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986).

31. In *Monimee v. Scherback*, 503 N.E. 2d 717, 724 (Ohio 1986), citing the AMA's own survey, the court noted that average premium costs as a percentage of a physician's gross income were about 3.7% in 1983, down from 4.4% in 1976. Quoting a 15-year study of malpractice claims and premiums, the court found that the insurance industry's natural behavior contributes to the continuing cycles of "crisis" and "remission." The high investment yields of the early 1980s led to an influx of new carriers and price cutting. In 1984, the strong dollar reduced the amount of insurance and reinsurance capacity outside the U.S. and emerging losses finally forced companies to raise premiums. Posner, *Trends in Medical Malpractice Insurance*

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claims," high insurance premiums and a medical malpractice "crisis" are typically recited rationales for these laws.[32]

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1970-1985, 49 Law and Contemp. Problems 37, 48 (Spring 1986). More recently, a University of Texas collaborative study found no evidence of a crisis in that state nor any material connection between claim costs and premium fluctuations. *See* Bernard Black, Charles Silver, David A. Hyman, and William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. of Empirical Legal Studies, at 207 (July 2005). "But the more likely explanation is that much of the rise in premiums reflects insurance market dynamics, not litigation dynamics." *Id.* at 210.

32. *In Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988), the Supreme Court of Wyoming said this about a law creating a medical review panel in reaction to "skyrocketing insurance premiums" and a perceived, but unproven, crisis:

> . . ."It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health. To the contrary, . . . if the medical profession is less accountable than formerly because of the special treatment it is afforded by [medical review panel] laws, then a relaxation of medical standards may occur with the public as the victim. '[T]o find that the protection and special dispensation given to health delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality.'" *Boucher v. Sayeed*, R.I., 459 A.2d 87, 94 (1983) (quoting from *American Bank & Trust Co. v. Community Hospital of Los Gratos-Saratoga, Inc.*, 104 Cal. App. 3d 219, 163 Cal.Rptr 513, 522 (1980)) . . .
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> We have said previously that "[t]he continued availability and vitality of *** causes of action [against health care providers] serve an important public policy- the preservation of quality health care for the citizens of this state." In light of this basic truth, we hold that the legislature's attempt to limit or reduce such causes of action is not rationally re[illegible]ed to a legitimate state interest.

Our holding th[illegible] the act is not rationally related to protection of the public health or economic and social stability of the state would be sufficient alone to find the act unconstitutional. However, we also are persuaded by the principle that:

> "[C]onstitutional protections are not suspended in time of even the most legitimate crisis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) (constitutional provisions exist 'in good and bad times'); cf. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (since discredited-internment of Japanese descendants during war); *Konigsberg v. State*

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Discriminating against minors and patients subjected to latent medical errors or who suffer latent "injuries" as a consequence is not a rational way to curb the excesses of the civil justice system.[33]

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Bar [of California], 353 U.S. 252, 77 S.Ct. 722, 1 L. Ed. 2d 810 (1957) (fear of communism). Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those *** injured by acts of malpractice." *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986).

. . . We cannot condone the legislature's use of the law to protect one class of people from financial difficulties while it dilutes the rights under the constitution of another class of people. Every profession confronts financial distress at some time, and that does not justify depriving others of the equal protection guaranteed by the constitution . . .

In holding as we do that the act denies equal protection of the law...we are cognizant that the majority of states have upheld similar provisions. However, we find the following language to be convincing:

"Most state courts give considerable deference to the state legislatures' specific declarations in statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis. A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry and toward the conclusion reached by the state legislature regarding the existence of a crisis.

State courts that have swept aside the equal protection argument have seriously shirked their judicial responsibilities. *Proper scrutiny of the constitutional validity of state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis* in the particular state." *Comment, Constitutional Challenges to Medical Malpractice Review Boards*, 46 Tenn.L.Rev. 607, 645 (1978).

33. *See, e.g., Kenyon v. Hammer*, 688 P.2d 961, 992 (Ariz.1984):

Arizona has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to and remedy by the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those who have been damaged. Under such a system, our constitutional guarantees would be gradually eroded until this state became no more than a playground for the privileged and influential.

D. Heightened Scrutiny Applied to Patients .

In *Coburn v. Augustin*, 627 F. Supp. 983 (D. Kan. 1995), the court struck down a Kansas medical malpractice statute abrogating the collateral source rule only in medical malpractice actions under the equal protection clause. That court cited a number of cases which applied "heightened" scrutiny to strike down different types of medical malpractice legislation, and a longer list of decisions employing rational basis analysis to uphold such statutes. *Id.* at 990, 992. Most of the cited cases applying heightened scrutiny did so because the laws abridged or trumped tolling provisions otherwise applicable to minors, as does the Georgia statutory scheme. Nevertheless, the *Coburn* court concluded that medical malpractice victims generally have no control over the inception of their afflictions and are relegated to a position of political powerlessness. The court then extended "heightened rational basis" scrutiny to legislation curtailing the rights of medical malpractice patients as opposed to other tort victims.

In *Carson, supra*, the New Hampshire Supreme Court invalidated a medical malpractice statute of limitations provision which required minors to sue at certain prescribed ages when New Hampshire otherwise tolled the tort claims of infants until age of majority. The court employed heightened intermediate scrutiny analysis. The court also invalidated a statute affording a discovery rule in medical malpractice cases only to plaintiffs who discovered the presence of a foreign object in their body after surgery. That offending statute, like its Georgia counterpart, is not limited in its application to minors.

The Supreme Court of Georgia, in *McDaniel, supra* at 161, validated intermediate scrutiny and recognized that "the 'equal protection' provisions of the Georgia Constitution . . . ,[34] though employing different phraseology than the Fourteenth Amendment, 'are substantially equivalent of equal protection of the laws under the U.S. Constitution.'" As already

34. *Id.* Yet in *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984) and again in *Clark v. Singer*, 298 S.E.2d 484 (Ga. 1983) both of which found the prior version of O.C.G.A. § 9-3-71 to be constitutionally infirm, the court bleeds the "substantial relation" test into rational basis analysis, ignoring the *McDaniel* differentiation.

explained, the dissenting justices in *Craven*, would have applied heightened intermediate scrutiny to invalidate these statutes because they impair the rights of patients to sue, not because the claimant may be a child. Yet, the *Craven* majority incorrectly announced that the only choice was between strict scrutiny and rational basis analysis, opting for the latter.

E. Heightened Intermediate Scrutiny is Mandated for Statutes Abridging the Rights of Minors .

There is clear constitutional authority throughout the United States for the application of heightened intermediate scrutiny to statutes which abridge the rights of minors. For example, in *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003), the court provided a detailed analysis of the three levels of scrutiny before concluding that heightened intermediate scrutiny was required of an ordinance curtailing the rights of children.[35] The court stated:

> It bears repeating that to satisfy intermediate scrutiny, the state must show that the challenged classification serves 'important governmental objectives and that the discriminatory means employed [are] substantially related to the achievement of those objectives.' *Wengler*, 446 U.S. at 150. In the context of minors' rights, an important governmental objective would, at the very least, address the vulnerabilities particular to minors.

Id. at 180.[36] The court duly noted that minors have no voice in the legislative process and are relegated to a position of political powerlessness. *Id.*

In *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993), the Utah Supreme Court applied heightened scrutiny to invalidate a medical malpractice statute which, like the Georgia statute, withdrew the prior tolling protection for minors:

> Historically, the law has recognized that special rules are necessary for children. In this and other states,

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35. Citing *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) for the proposition that minors occupy a unique position in our constitutional scheme.

36. This case also cites *Clark v. Jeter*, 486 U.S. 456, 461 (1988) and *Craig v. Boren*, 429 U.S. 190, 197 (1976) in support of the view that "quasi-suspect" classifications or "important" rights may invoke an intermediate level of scrutiny.

> courts and legislatures have generally conferred a special status on minors with respect to their legal capacity to sue and be sued. Because of their lack of experience, judgment, knowledge, resources, and awareness, minors cannot effectively assert and protect their legal rights. That is especially true in the context of medical malpractice lawsuits with respect to infants who suffer physical, mental, or emotional injuries that are not apparent and cannot be discerned or communicated by the infant until he or she reaches a later stage of development and is more mature.

Id. at 578. The court observed that this Court "has applied a stricter standard of scrutiny in a number of federal equal protection cases involving the rights of children, although none involved a state medical malpractice act." *Id.* at 583.[37]

The court in *Gaufin* then analyzed the shortened limitations period which Utah's medical malpractice statutes applied to minors as follows:

> [It] not only treats minors injured by a healthcare provider categorically different from minors injured by all other defendants, but it also treats minors and adults as if they were situated the same under the law. Minors and adults are not, however, similarly situated under the law with respect to their ability to assert a claim for injuries caused by malpractice. Minors, unlike adults, have no legal capacity to sue. Their legal incapacity is based on fundamental differences between adults and minors with respect to their

37. Citing *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) ("If the State is to deny a discrete group of innocent children [undocumented children] the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."); *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) ("We are asked to decide whether the discrete procedural demands that [a descent and distribution statute] places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve."); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (scrutiny of classifications based on illegitimacy is "not a toothless one"); and *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 172 (1972) ("when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny").

> physical, intellectual, psychological, and judgmental maturity. If the law failed to recognize those differences, the legal rights of minors could be exploited unconscionably and the law made an instrument of oppression as to the legal rights of minors.

Id. at 577. The court examined the legislation's stated purposes, including counteracting increased health care costs and physician attrition said to have resulted from increased malpractice claims and judgments. *Id.* at 583 n. 17. Citing a report of the National Association of Insurance Commissioners ("NAIC") and a report by the U.S. Department of HEW[38], the court concluded that long-tail claims for injuries to minors had a comparatively minor impact on medical malpractice insurance costs:[39]

> [T]he nonuniform application of the limitations provisions . . . to minors' malpractice claims does not actually and substantially further the policy of curbing and reducing malpractice premiums and of ensuring reasonably priced health-care service to the people of Utah and is not necessary to accomplish those ends. Furthermore, even if there were evidence of significantly increased malpractice lawsuits or increased jury verdicts in Utah, that would not be a legitimate basis for discriminating against the malpractice claims of minors. And even if we were to assume that increased minors' malpractice claims increased malpractice insurance premiums and costs of health care to some extent that would not justify

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38. NAIC, Malpractice Claims: Final Compilation, Medical Malpractice Closed Claims, 1975-1978 (1981) and U.S. Department of HEW, Pub. No. 73-88. Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice 254 (1973).

39. *See also Kenyon v. Hammer*, 688 P.2d 961, 978 (Ariz. 1984) (citing the same reports and finding that there was no basis for concluding rising healthcare costs had any causal connection to an increase in medical malpractice premiums.) 97% of all medical malpractice claims were reported within four years of injury. The court found no long-tail claims problem mandating the need for shorter periods of limitation. *Id.*

> shifting the costs of malpractice injuries from health-care providers to injured children and their caretakers.

Id. at 587.

The New Hampshire court in *Carson*, also held that the special statutes of limitation enacted for medical malpractice cases could not abrogate the protection afforded to minors under a saving statute tolling claims until age of majority:

> The legislature may not, consistent with equal protection principles, deny only this class of medical malpractice plaintiffs the protection afforded all other persons by the saving statute. In doing so [the statute at issue] does not substantially further the legislative object of containing the costs of the medical injury reparations system because the number of malpractice claims brought by or on behalf of minors or mental incompetents is comparatively small. At the same time, the statute operates to extinguish a cause of action which the plaintiff, due to his disability, may not have learned until after the limitations period has expired. . . .

424 A.2d at 834 (Internal citations omitted).

In *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983), the court held that a similar statute triggered at age ten violated equal protection:

> We recognize that the General Assembly often must draw lines in legislation. Yet, it is the age of majority which establishes the only rational distinction... Therefore, in light of our conclusion that [the statute] creates an irrational classification which does not rationally further the purpose of [the legislation], we hold that [it] is unconstitutional on its face with respect to medical malpractice litigants who are minors.

Id. at 1339.

In *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986), the court then held that the statute addressed in *Schwan* also violated due process:

> [T]he sum and substance [of the statute] is that a minor shall have no standing to sue before attaining the age of majority, and no right to bring suit thereafter. Such, in our view, is totally unreasonable and patently

> arbitrary. The practical effect of our holding will restore the 'disabilities' tolling statute . . . for minors with malpractice claims.

A concurring justice noted in *Mominee* that

> [r]esearch has revealed no authorities which contend that due to the high cost of malpractice insurance, it is no longer profitable to be a healthcare provider. . . . Nor is there any evidence that the medical profession has at any time been in danger of extinction. Thus, I find no rational connection between [the statute] and the purposes for which it was enacted. Therefore [the statute] 'fails to pass constitutional muster as it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.'

Id. at 727. The Court cited *Shessel* in support for its position invalidating the Ohio statute. *Id.* at 728.

In *Sax v. Votteler*, 648 S.W.2d 661, 666-67 (Tex. 1983), the court described the heart of the problem with such statutes:

> A child has no right to bring a cause of action on his own unless disability has been removed. If a minor does bring a cause of action in his own behalf, the action is subject to being abated upon a timely plea of the defendant. If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by [the malpractice statute], the child is precluded from asserting his cause of action under that statute. (Citations omitted).

The Texas statute, the court wrote, "effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative. . . ." *Id.* at 667.

The court in *Sax* noted that inherent deficiencies of the statute could not be cured by the fact that parents, guardians, or next friends could assert the rights of the child:

> If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided . . . , the child is precluded from asserting his cause of action under that statute. . . . The child, therefore, is effectively barred from any

> remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit within the time provided. . . .

648 S.W.2d at 666-67 (citations omitted). The statutes challenged here have the same inherent constitutional defects.

CONCLUSION

Starting a statutory clock running on patients and children who lack the competence or the training to discover most medical errors and who do not know of a resultant injury cannot comport with equal protection or due process. A state legislature cannot rationally decide that minors are incompetent and incapable of protecting their rights before age of majority – and indeed precluded from doing so – and then later decide that they nevertheless must do so in medical malpractice cases. The challenged statutes trump other Georgia laws protecting the rights of minors until age of majority. They co-exist with a statutory discovery rule which obtains only in cases of foreign objects left in surgical patients, found to be unconstitutional in other states such as New Hampshire.

The Fourteenth Amendment cannot abide conceptually indistinguishable laws from one state to the next, which in the one satisfy the Constitution and in the next do not. Nor do statutes which deprive patients or children (or both) of rights and remedies available to others conform to due process or equal protection of the law. A child here spent sixteen years with undiagnosed HIV/AIDS and the next five learning that Georgia courts do not have to hear his whole case. The Supreme Court of the United States should grant the Writ of Certiorari.

Respectfully submitted,

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

APPENDIX

APPENDIX A – ORDER OF THE SUPREME COURT OF GEORGIA DATED FEBRUARY 27, 2006

SUPREME COURT OF GEORGIA

Atlanta February 27, 2006

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

S06A0943. CHARLES CANAS, et al. v. AYMAN AL-JABI, et al.

S06X0944. SHARON J. KAMINER v. CHARLES CANAS, et al.

S06X0945. AYMAN AL-JABI v. CHARLES CANAS, et al.

S06X0946. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA v. CHARLES CANAS, et al.

S06X0947. MCG HEALTH, INC. v. CHARLES CANAS, et al.

This appeal and cross-appeals arise out of a medical malpractice action brought on behalf of a minor. The trial court granted summary judgment to the defendants for all malpractice claims in which the alleged negligence occurred more than five years before suit was brought. The trial court held that OCGA §§ 9-3-71 and 9-3-73 do not violate the due process or equal protection clauses of the United States or Georgia constitutions, and it is the constitutional rulings that cause the appellants to invoke this Court's jurisdiction. However, this Court has previously upheld these statutes against the same challenges as they relate to minors. See *Crowe v. Humana Hospital*, 263 Ga. 833 (439 SE2d 654) (1994); *Smith v. Cobb County-Kennestone Hosp. Authority*, 262 Ga. 566 (423 SE2d 235) (1992). Accordingly, the constitutional rulings do not invoke this Court's jurisdiction, *Zepp v. Mayor*

Appendix A

and Council of the City of Athens, 255 Ga. 449 (339 SE2d 576) (1986). Accordingly, the appeal and cross-appeals are hereby transferred to the Court of Appeals.

s/ [illegible]
Chief Deputy Clerk

APPENDIX B – ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED APRIL 13, 2006

SUPREME COURT OF GEORGIA

Case No. 506X0947

Atlanta, April 13, 2006

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MCG HEALTH, INC. v. CHARLES CANAS et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

APPENDIX C – ORDER OF THE SUPERIOR COURT OF GLYNN COUNTY, STATE OF GEORGIA DATED AND FILED SEPTEMBER 19, 2005

IN THE SUPERIOR COURT OF GLYNN COUNTY STATE OF GEORGIA

CIVIL ACTION

File No. 01-01831

CHARLES AND LESA CANAS, As Natural Guardians and Next Friends of Derek Callas, a Minor,

Plaintiffs,

vs.

AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., BOARD OF REGENTS OF THE UNIVERSITY OF SYSTEM OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA HOSPITALS AND CLINICS, and MCG HEALTH, INC.

Defendants.

ORDER

This case comes before the court on Defendants' Motion for Summary Judgment and Motions to Disqualify Witnesses. For the reasons set forth below, this court grants partial summary judgment to the defendants and denies Defendants' Motions to Disqualify Witnesses.

Summary Judgment is granted to Defendants for all medical malpractice claims in which the negligence that is the basis of the claim occurred more than 5 years before suit was filed. (The 5 year date is December 28, 1996 for all

defendants except the Board of Regents; the 5 year date for the Board of Regents is February 7, 1998.) O.C.G.A. § 9-3-71 (b) is the Georgia statue of repose in medical malpractice actions; it states: "(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(b). It is also clear that Georgia courts interpret this statute strictly.

> "Whether by discovery, which delays the accrual of the action, or by infancy, incompetency, or fraud, which may toll the statute of limitation for up to five years . . . , nothing stops the abrogation of the action by the statute of repose; five years after the negligent or wrongful act or omission occurred, despite any non-discovery or any tolling, the medical malpractice action or potential action ceases to exist by abrogation of law under the statute of repose." *Simmons v. Sonyika et al*, 279 Ga. 378, 380 (2005).

While this statute and its interpretation may be unfair, or even absurd as it applies to cases such as this one, it is the law and we must apply it. Accordingly, Summary Judgment is granted to Defendants on all claims for medical malpractice where the alleged negligent or wrongful act or omission occurred more than 5 years before the date on which this action was brought.

Defendants' Motion for Summary Judgment is denied as to all claims for medical malpractice where the alleged negligent or wrongful act or omission occurred within 5 years of the date this action was brought. O.C.G.A. §§ 9-3-71(a),(b), and (c) make it clear that negligent or wrongful acts or omissions occurring within 5 years of the date an action is brought are actionable if the claims are

brought within two years of the occurrence of the injury they caused and, therefore, not barred by the statute of limitations.

> "(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
>
> (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.
>
> (c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation. O.C.G.A. § 9-3-71 (2005).

Accordingly, Summary Judgment is Denied to Defendants on all medical malpractice claims where the injury occurred within 2 years of the date this action was filed and the negligent or wrongful act or omission that caused the injury occurred within 5 years of the date this action was filed.

Defendants' Motions to Disqualify John W. Sleasman, M.D., Janice E. Milligan, M.D., and Steven L. Shore, M.D. as expert witnesses is denied. Plaintiff's experts meet the requirements of O.C.G.A. § 24-9-67.1. Since defendants question whether they are qualified to testify in this area of medicine, the applicable portion of O.C.G.A. § 24-9-67.1 is § (c)(2)(a):

> "(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> > (a) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed *or* rendered negligently by the defendant whose conduct is at issue;"

Each of these experts is proposed to testify in the area of pediatrics. Each of them has been actively engaged in the practice of pediatrics for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge concerning the practice of pediatric medicine.[1]

Defendants read the statute to state that each expert mast practice in exactly the same specialty as the defendant. Defendants' reading of the statute is adverse to the plain reading of the statute. The statute states the expert must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to he given" O.C.G.A. § 9-24-67.1(c)(2). The statute does not state

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1. Expert Sleasman practices in the fields of Pediatrics, Allergy and Immunology, and Diagnostic and Laboratory Immunology and has practiced in each of these areas for the last 5 years; Expert Shore practices Pediatrics specializes in pediatric infectious diseases and has practiced in these areas for the last 5 years; Expert Milligan practices Pediatrics and specializes in primary care and has practiced in these areas for the last 5 years.

that the expert must have actual professional knowledge and experience in the exact area of practice or specialty in which the defendant doctor specializes. It is apparent that the legislature realizes that doctors' areas of practice often overlap. This overlap is apparent from the practice of medicine as doctors from several different specialties often participate in the treatment of a patient, This Court's reading of the statute is also supported by other courts facing the same question. *See Murphy, et al. v. Anders, et al.*, Superior Court of Muscogee County, Civil Action Number SU01CV3120, Order dated August 5, 2005 (stating that a hematologist is qualified to testify concerning sickle cell anemia when the defendant doctor is an emergency room doctor); *Phillips v. Cotten*, State Court of Dougherty County, Civil Action Number 01-SCV815, Order dated June 10, 2005 (stating that a vascular surgeon is qualified to testify concerning vascular issues when the defendant doctor is a general orthopedic surgeon).

Considering the wording of the statute and the rulings of other similarly situated courts, this Court therefore rules that experts must only have actual professional knowledge and experience in the subject matter to which they are testifying, not that an expert's entire practice be in the same exact specialty as that of the defendant.

Accordingly, Defendants' Motions to disqualify witnesses Sleasman, Shore and Milligan is Denied.

Defendants' Motions to Disqualify Dr. Williams as an expert witness is denied. Although Dr. Williams meets the requirements of O.C.G.A. 24-9-67.1(c)(2)(a) as outlined above, this is not necessary as he is not testifying to allegations of medical malpractice. Defendants' argument that Dr. Williams' testimony does not meet *Daubert* standards as now codified in Georgia law is without merit. O.C.G.A. 24-9-97.1 (b) states:

Appendix C

"(b) If scientific, technical, or ether specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the cases"

Dr. Williams vast experience, knowledge, skill, training, and education qualify him to testify concerning medical records. *See* Exhibit 2 of Williams Deposition, C.V. of Dr. Roger A. Williams. Dr. Williams' testimony will be based on facts or data which will be admitted into evidence at trial. Dr. Williams testimony is the product of reliable principles and methods.[2] Dr. Williams has applied these principles and methods reliably to the facts of this case. *See* Affidavit of Roger A. Williams, M.D. Dr. Williams' principles and methods were applied in the late 1980s and early 1990s and were successful. In fact, the standard of care used by Dr. Williams has proven to be the best and most effective standard of care in dealing with patients who may have received AIDS through a blood transfusion. Had it been

2. Dr. Williams expresses that his actions were based on recommendations by the CDC and Public Health Service in 1987 and that they were reinforced by the "Report of the Presidential Commission on Human Immunodeficiency Virus Epidemic" published June 24, 1988. (Item number 10 in the affidavit of Dr. Williams)

applied in the case at bar, it is likely that no litigation would have occurred and Derek Canas' injuries would have been greatly lessened. Dr. Williams' principles and methods are clearly reliable and should be admitted.

In oral argument, defendants argued that since Dr. Williams proposed a high standard of care that few hospitals attained, his testimony was not acceptable. This Court disagrees with that proposition. When evaluating admissibility of evidence, courts must consistently apply the law in ail cases. If the court rules that a plaintiff's expert cannot testify because her standard of care or scientific reliability has proven to be too high because she was one of the few in the country using that standard or method, the court must also rule that defendant's expert in the same situation could not testify because his standard of care or method would he too high if he was one of the few in the country using that higher standard. This would create the awkward situation where a defendant could not present evidence from the leading practitioner in his field that had a very high standard of care or very advanced method for performing a procedure yet another expert could testify for the plaintiff to a lower standard of care or less advanced method of performing a procedure.[3] Judges are not called on to base decisions regarding admissibility on whether the plaintiff or defendant proposes the evidence. Instead, judges must determine whether testimony meets scientific

3. Effectively, defense counsel's argument would make it so that a world renowned surgeon who had perfected a technique that, for example, would effectively allow someone to recover from an ACL injury in two months could not testify that a surgeon followed his exact method for treating the injury but that a less advanced doctor who had no idea how to perform this advanced operation could testify against the surgeon using the advanced method because "most doctors did not use the advanced method so it is not in the mainstream of science." It is extremely doubtful that the legislature intended a result such as this that would discourage doctors from using advanced treatments and having a higher standard of care.

standards for reliability and is based upon application of those scientific standards to the facts of the case. Dr. Williams testimony clearly meets these standards. Therefore, Defendants' Motion to Disqualify Dr. Williams as an expert is Denied.

Accordingly, Defendants' Motions for Summary Judgment are Granted as to all claims of medical malpractice occurring more than 5 years before this suit was filed and Denied for all claims of medical malpractice occurring within 5 years of the day this suit was filed; Defendants' Motions to Disqualify Expert Witnesses Sleasman, Shore, Milligan, and Williams are Denied.

This 19 day of September 2005.

s/ Amanda F. Williams
AMANDA F. WILLIAMS
Judge, Superior Courts
Brunswick Judicial Circuit

APPENDIX D – ORDER OF THE SUPERIOR COURT OF GLYNN COUNTY, STATE OF GEORGIA DATED OCTOBER 14, 2005 AND FILED OCTOBER 17, 2005

IN THE SUPERIOR COURT OF GLYNN COUNTY STATE OF GEORGIA

CIVIL ACTION

FILE NO. 01-01831

CHARLES AND LESA, CANAS, as Natural Guardians and Next of Friends of DEREK CANAS, a minor,

Plaintiffs,

v.

AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA HOSPITALS AND CLINICS, and MCG HEALTH, INC.

Defendants.

ORDER

This Court having entered an Order on September 19, 2005 diapositive of certain issues pertaining to summary judgment motions of the parties, and the Order by implication having affirmed the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, the Court hereby expressly finds that those two statutes do not violate the equal protection or due process clauses of the United States or Georgia Constitutions. See, *Smith v. Cobb County-Kennestone Hospital Authority*, 262 Ga. 566, 423 S.E.2d 235 (1992).

Appendix D

This issue has been raised by the plaintiffs in opposition to defense motions for summary judgment It is of critical importance to the disposition of the case that there be an immediate review of this Order and in the event that an appellate court determines that this Order or the prior Order of the Court of September 19, 2005 is not subject to direct appeal, the Court hereby ratifies a review of this Order for immediate review.

This 14 day of October, 2005.

s/ Amanda F. Williams
AMANDA F. WILLIAMS
Judge, Glynn County Superior Court
Brunswick Judicial Circuit

APPENDIX E – ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DATED NOVEMBER 2, 2005

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

The Court of Appeals hereby passes the following order:

NOV 02 2005

A0610048. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA v. CHARLES CANAS ET AL.

A0610050. SHARON J. KAMINER, M.D., ET AL v. CHARLES CANAS ET AL.

A0610052. MCG HEALTH, INC. v. CHARLES CANAS ET AL.

A0610053. AYMAN AL-JABI, M.D. v. CHARLES CANAS ET AL.

On October 6 and 7, 2005, defendant applicants fled applications for interlocutory review of the order, entered September 19, 2005, which granted in part and denied in part their motions for summary judgment and denied their motion to disqualify witnesses. On October 17, 2005, the trial court entered an order in which it noted that its order of September 19, 2005 had implicitly affirmed the constitutionality of OCGA §§ 9-3-71 and 9-3-73, and expressly ruled that OCGA. § 9-3-71 and 9-3-73 did not violate the equal protection and due process clauses of either the Constitution of the United States or the Georgia Constitution of 1983.

On October 18, 2005, plaintiff respondents filed a timely notice of direct appeal of the orders entered September 19, 2005 and October 17, 2005. The notice of appeal contains a

jurisdictional statement asserting that exclusive jurisdiction of the direct appeal is vested in Supreme Court of Georgia. Subsequently, each of the defendant applicants filed timely notices of cross appeal. Accordingly, all matters raised in these applications can now be asserted in these cross appeals. OCGA § 5-4-34 (d).

Under *Saxton v. Coastal Dialysis &c.*, 267 Ga. 1278 (476 SE2d 587) (1996), the ultimate responsibility for determining appellate jurisdiction is vested in the Supreme Court of Georgia. It appears that the same constitutional issues as have arisen in the direct appeal world now be litigated if these applications are granted. Therefore, in the interest of judicial economy, these applications are TRANSFERRED to the Supreme Court of Georgia for appropriate appellate disposition when the direct appeal currently being processed in the Superior Court of Glynn County is forwarded to the Supreme Court for determination.

s/ [illegible]
Clerk

APPENDIX F – CONSTITUTIONAL AND ADDITIONAL STATUTORY PROVISIONS

Ga. Const. art. VI, § 6, ¶ II. Exclusive appellate jurisdiction of Supreme Court:

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question.

O.C.G.A. § 1-2-8. Rights of minors:

> The law prescribes certain ages at which persons shall be considered of sufficient maturity to discharge certain civil functions, to make contracts, and to dispose of property. Prior to those ages they are minors and are, on account of that disability, unable to exercise these rights as citizens.

O.C.G.A. § 9-2-28. Effect of action by minor alone:

> An action commenced and prosecuted by an infant alone shall not be void. Although the action may be defective in wanting a guardian or next friend, the defect shall be amended before verdict and cured by verdict.

Appendix F

O.C.G.A. § 9-3-33. Injuries to the person:

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

O.C.G.A. § 9-3-71. General limitations*:

Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which the negligent or wrongful act or omission occurred.

O.C.G.A. § 9-3-71. General limitations:

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

---

* This former version of O.C.G.A.§ 9-3-71 was enacted in 1976, and was held unconstitutional in *Shessel v. Stroup,* 316 S.E.2d 155 (Ga. 1984) after being held unconstitutional in its application to a wrongful death case where the death occurred more than two years after the negligent act in *Clark v. Singer, 298* S.E.2d 484 (1983).

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-72. Foreign objects left in body:

The limitations of Code Section 9-3-71 shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act of omission is discovered. For the purpose of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

O.C.G.A. § 9-11-9.1. Affidavit of expert to be filed with complaint in action for damages alleging professional malpractice:

(a) In any action for damages alleging professional malpractice against a professional licensed by the State of *Georgia* and listed in subsection (d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of this Code section, the plaintiff shall be required to file with the

complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(c) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(d) The professionals to which this Code section applies are:

(1) Architects;

(2) Audiologists;

Appendix F

(3) Attorneys at law;

(4) Certified public accountants;

(5) Chiropractors;

(6) Clinical social workers;

(7) Dentists;

(8) Dietitians;

(9) Land surveyors;

(10) Medical doctors;

(11) Marriage and family therapists;

(12) Nurses;

(13) Occupational therapists;

(14) Optometrists;

(15) Osteopathic physicians;

(16) Pharmacists;

(17) Physical therapists;

(18) Physicians' assistants;

(19) Professional counselors;

(20) Professional engineers;

(21) Podiatrists;

(22) Psychologists;

(23) Radiological technicians;

(24) Respiratory therapists;

(25) Speech-language pathologists; or

(26) Veterinarians.

Appendix F

O.C.G.A. § 9-11-17(c). Parties plaintiff and defendant; capacity:

> *Infants or incompetent persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may bring *or* defend an action on behalf of the infant or incompetent person. If an infant or incompetent person does not *have* a duly appointed representative, he may bring an action by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. No next friend shall be permitted to receive the proceeds of any personal action, in the name and on behalf of an infant, or incompetent person, until such next friend shall have entered into a sufficient bond to the Governor, for the use of the infant and the infant's representatives, conditioned well and fully to account for and concerning such trust, which bond may be sued on by order of the court in the name of the Governor and for the use of the infant. Such bond shall be approved by the court in which the action is commenced and such approval shall be filed in such clerk's office.

Appendix F

O.C.G.A. § 39-1-1. Age of majority; nonresident students:

(a) The age of legal majority in this state is 18 years; until that age all persons are minors.

(b) Nothing in this Code section shall be construed automatically to render an individual a resident of this state when that individual is in the state for the purpose of attending school. In the case of such individual, his residence will be considered to be the state in which his parents reside if under the laws of that state the individual would still be considered a minor and he is incapable of proving his emancipation.

No. 05-1671

Supreme Court, U.S
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In The
Supreme Court of the United States

CHARLES and LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia

BOARD OF REGENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

THURBERT E. BAKER
Attorney General

KATHLEEN M. PACIOUS
Deputy Attorney General

BRYAN F. DORSEY
Counsel of Record
Special Assistant Attorney General
2876 Johnson Ferry Road, NE,
Suite 200
Marietta, Georgia 30062
770-594-3320
Attorneys for Respondent
Board of Regents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Georgia's medical malpractice statute of limitation at O.C.G.A. § 9-3-73(b), requiring that a minor who is under age 5 at the time of the injury, bring an action by his or her seventh birthday violates the guarantees of equal protection and due process under the Fourteenth Amendment?

2. Whether Georgia's medical malpractice statute of repose at O.C.G.A. § 9-3-73(c), requiring that a minor who is under age 5 at the time of the allegedly negligent act or omission, bring an action by his or her tenth birthday violates the guarantees of equal protection and due process under the Fourteenth Amendment?

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Appendix A – Constitutional and Statutory Provisions 1a

STATEMENT OF THE CASE

The Supreme Court of Georgia, which may decline to exercise its exclusive appellate jurisdiction over constitutional challenges to Georgia statutes, where the law is well-settled,[1] transferred this case and four cross-appeals (*i.e.*, one per Respondent-Defendant) to the Georgia Court of Appeals for resolution of both the federal and state constitutional issues and other state law issues. All five cases[2] have been fully briefed without oral argument and are awaiting decision by the Georgia Court of Appeals on all these issues. Petitioners (Plaintiffs in the trial court below) have argued on brief that the Court of Appeals of Georgia could find that the Georgia medical malpractice statutes of limitation and repose at O.C.G.A. §§ 9-3-73(b) and 9-3-73(c) do not bar their claims.

The trial court's first order on September 19, 2005, does not address the constitutional issues because they were not raised at the hearing on September 13, 2005. After all Respondents (Defendants in the trial court) had petitioned the Georgia Court of Appeals via O.C.G.A. § 5-6-34(b) for an interlocutory review of the state law issues,[3]

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[1] *Pollard v. State*, 229 Ga., 698 (1972). *Braden v. Bell*, 222 Ga. App. 144, 146 (1996).

[2] The pending main appeal is *Canas v. Al-Jabi et al.*, Georgia Court of Appeals, Case No. A06A1337. The pending four cross-appeals are: *Kaminer v. Canas*, Case No. A06A1338, *Al-Jabi v. Canas*, Case No. A06A1339, *Board of Regents v. Canas*, Case No. A06A1340, and *MCG Health Inc. v. Canas*, Case No. A06A1341.

[3] Interlocutory review under O.C.G.A. § 5-6-34(b) was sought because the trial judge's order granted Respondent-Defendants only partial summary judgment on the statutes of limitation and repose and left the case pending for trial about injuries and damages occurring two years before the complaint and negligent acts or omissions occurring five years before the complaint.

then on Friday, October 14, 2005, Petitioners presented the trial judge another order ruling *in Respondents' favor* that the Georgia medical malpractice statutes of limitation and repose did *not* violate the state or federal constitutional guarantees of equal protection or due process.[4] This second order, which the trial judge signed on Monday, October 17, 2005, was carefully worded so as not to misstate the fact that neither the trial judge nor any of the attorneys raised the constitutional challenges at the hearing.[5] Respondent did not oppose the second Order, since it believed it to be an accurate statement of the law. Petitioners then took a direct appeal from this second Order to the Supreme Court of Georgia[6] on the constitutional issues. All Respondents-Defendants filed cross-appeals there on the other state law issues. The four petitions for interlocutory review in the Georgia Court of Appeals were dismissed as moot but the Supreme Court of

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[4] Georgia's procedure at § 5-6-34(b) for requesting interlocutory review of an order, which does not finally dispose of the case in the trial court, does not deprive the trial judges of jurisdiction until the appellate court grants the request for interlocutory review and a notice of appeal is filed.

[5] The Order of October 17, 2005 reads: "This [constitutional] issue has been raised by Plaintiffs in opposition to defense motions for summary judgment." Some disinterested person reading the Order might conclude that the issue was discussed at the hearing on the motion. However, the specific language of the Order means that the issue was raised in one brief in opposition to one of the four Respondents'-Defendants' Motions at the trial level.

[6] The Georgia Civil Practice Act permits an appeal from a non-final judgment where summary judgment is granted to any party on any one issue. O.C.G.A. § 9-11-56(h). Respondents-Defendants could not utilize this vagary of Georgia procedure because the first Order granted only partial summary judgment on each issue.

Georgia then transferred all five appeals and cross-appeals to the Georgia Court of Appeals.

STATEMENT OF LACK OF JURISDICTION

Even though the Supreme Court of Georgia has virtually directed the Court of Appeals of Georgia to find that Georgia's medical malpractice statutes of limitation and repose do not violate the state or federal constitutional guarantees of equal protection, this Court does not have subject matter jurisdiction over this case under 28 U.S.C. § 1257(a). That section allows the Supreme Court of the United States to review final judgments of the highest courts of individual states about whether a state statute violates the federal constitution.

> Final judgments of decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of . . . a statute of any State is drawn in question on the grounds of it being repugnant to the Constitution . . . of the United States . . . or where any . . . right . . . is . . . claimed under the Constitution . . . of . . . the United States.

28 U.S.C. § 1257(a).

The pragmatic approach, adopted by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), about subject matter jurisdiction under § 1257(a) does not allow review simply because a party has exhausted its right of appeal of a federal constitutional issue within the state courts. Such a condition is necessary but not determinative under *Cox Broadcasting Corp.* Rather review is

allowed only where the determination of the federal constitutional issue is necessary for practical purposes. Practically speaking, a decision whether or not the state statutes violate the federal constitution is not necessary under the facts of this case because, regardless of any decision on that federal issue, this personal injury case must still be decided on the basis of state law.

In *Cox Broadcasting*, this Court enumerated four separate categories of cases where a judgment, while not final in the strict sense, would be treated as such for practical purposes. Those four categories cover cases: (1) "in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." This Court recently reiterated

those same categories in *Florida v. Thomas*, 532 U.S. 774, 777-780 (2001).[7]

Petitioners'-Plaintiffs' case here does not fall within any of these four enumerated exceptions corresponding to the numbers below. (1) Unlike *Mills v. Alabama*, 384 U.S. 214 (1966), where the only defense to a criminal conviction was the exercise of free speech under the First Amendment, the federal issue here will not conclude or preordain the outcome. Whether or not this Court finds that Georgia's medical malpractice statutes of limitation and repose violate the United States Constitution, the case still must be resolved on the basis of state law. If Plaintiffs-Petitioners were to prevail in this Court and the statutes were found invalid, then a trial would be required. If Plaintiffs-Petitioners do not prevail in this Court, then the Georgia Court of Appeals must still determine under state law whether (a) a new injury bars application of the statute of limitation and whether (b) fraud estops Defendants-Respondents from arguing the statute of repose.

(2) Unlike *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945),[8] the federal constitutional issue raised may never need to be decided. Plaintiffs-Petitioners could prevail in the Georgia Court of Appeals on the application of the medical malpractice statutes of limitation and repose to the facts of the case. If the Georgia Court of

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[7] *Florida v. Thomas*, 532 U.S. 774 (2001), involving review of a state court determination that the death penalty violated the federal constitution, fell into the third category.

[8] Whatever the outcome of the accounting ordered by the Nebraska Supreme Court, the federal issue regarding the transfer of the radio station would still have to be decided.

Appeals determines that these statutes do not bar the claim, then Plaintiffs-Petitioners can proceed to trial.

(3) Unlike *Florida v. Thomas, supra*, Petitioners-Plaintiffs are not precluded from pursuing the federal constitutional question later if the Georgia Court of Appeals decides that the statutes of limitation and repose completely barred their action. They can later petition this Court for certiorari after the Georgia appellate courts have finally ruled on their claim.

(4) Unlike *Cox Broadcasting*, if Plaintiffs-Petitioners were now successful on appeal to this Court and the Georgia statute were held to violate the Fourteenth Amendment, Defendants'-Respondents' dismissal will be precluded, and a trial will be provided in the Georgia court. *Cox Broadcasting* presents the exact opposite of the current situation because, there, if petitioners prevailed on the federal constitutional question, then future litigation in the state court would have been precluded.

Cox Broadcasting had published the name of a rape victim in violation of a Georgia statute, which the media claimed was an infringement of the right of free speech under the First Amendment. The Georgia Supreme Court found the statute constitutional and remanded the case for trial on a common law invasion of privacy claim by the rape victim's parent(s). This Court granted certiorari because, if the media prevailed on the constitutional question, there would be no need for a state court trial, even though the media might have ultimately prevailed during the jury trial.

By contrast, in the current case, if certiorari is granted and if Petitioners-Plaintiffs prevail on the federal

constitutional question and the Georgia medical malpractice statutes of limitation and repose are struck, then a trial in the state system will not be precluded but rather provided. Because a determination by this Court in Petitioners'-Plaintiffs' favor will not preclude future litigation (category 4), may not be needed at all (categories 1 and 2), and, if needed, can be made later (category 3), this Court does not now have subject matter jurisdiction under § 1257(a) and should dismiss the Petition for Certiorari.

STATEMENT OF FACTS

Petitioner Derek Canas was born on November 10, 1984. Respondent Board of Regents of the University System of Georgia ("Board of Regents") operated the Medical College of Georgia Hospitals and Clinics ("MCGH&C") and employed Sharon Kaminer, M.D. as part of its mission for medical education.[9] Petitioner received blood transfusions, allegedly contaminated by the human immunodeficiency virus ("HIV"), at MCGH&C during January and February, 1985, when no blood test was available for HIV. Such a test became available at MCGH&C on or about March 22, 1985, but Respondent did not recommend or provide such a test to Petitioner Derek Canas. Petitioner displayed persistent growth delay, characteristic of children with Acquired Immunodeficiency Syndrome ("AIDS"), at age one or two in 1985 or 1986. Respondent through its employees, including Dr. Kaminer, never told Petitioners that the growth delay was attributable to the congenital heart

[9] Co-respondent MCG Health, Inc. assumed operation of MCGH&C effective July 1, 2000.

defect, surgery for which had originally necessitated the blood transfusions. Petitioner Derek Canas was last examined at MCGH&C on February 15, 2001, and was first provided a diagnosis of AIDS in April, 2001. Petitioners brought this current lawsuit against Respondent on February 7, 2003. Whether this lawsuit was brought within two years of the injury and within five years of the negligent act or omission are questions to be decided during the pending appeal of this case before the Court of Appeals of Georgia. It is undisputed that suit was not filed by the time Petitioner Derek Canas reached his seventh birthday (*i.e.*, November 10, 1991) or his tenth birthday (*i.e.*, November 10, 1994).

SUMMARY OF ARGUMENT

In order to assure the availability of medical providers, stabilize medical malpractice insurance premiums, and limit malpractice exposure from old claims, Georgia's statutes of limitation and repose for medical malpractice actions abrogate the ordinary tolling provision for personal injury actions until majority and impose different requirements for minors of different age. Minors, who have reached age five, are subject to the same requirements as adults and must bring suit within two years of the injury (*i.e.*, period of limitation) and no more than five years after the negligent act or omission (*i.e.*, period of repose). O.C.G.A. §§ 9-3-71(a), 9-3-71(b), 9-3-73(b), 9-3-73(c)(2)(B). Minors, like Petitioner Derek Canas, under age five at the time of the injury must file suit by their seventh birthday. § 9-3-73(b). Minors under age five at the time of the negligent act or

omission must also file by their tenth birthday. § 9-3-73(c)(2)(A).[10]

Petitioners claim that these schedules unlawfully treat (1) minors with medical malpractice claims differently from minors with other personal injury claims and (2) persons with latent, undiscovered medical malpractice claims differently from persons with patent, discovered claims.[11] Petitioners urge this Court to review this case because of an alleged lack of uniformity among the decisions of the state supreme courts and then to apply stricter scrutiny than a rational basis in order to find a violation of the guarantees of equal protection under the laws and due process of law within the Fourteenth Amendment. Yet the vast weight of judicial authority utilizes a rational basis test and finds similar statutes constitutional. Also the alleged lack of uniformity among the states is almost entirely attributable to (a) differing state laws defining when medical malpractice claims arise and (b) varying understandings of equal protection and due process under state constitutions.

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[10] The only exception, not relevant here, arises where a foreign object is left in the body, and in those cases a claimant, regardless of age, or date of injury or of the act, also has one year from the discovery of the foreign object to file suit. § 9-3-72.

[11] Petitioners claimed below that the two-tiered statutes violated equal protection because a newborn, injured at birth, had a ten-year statute of repose and a seven-year statute of limitation but a minor, injured by malpractice just after his fifth birthday, had a five-year statute of repose and a two-year statute of limitation. Plaintiffs have dropped this argument because they benefited from this arrangement. Because the injury alleged in this case (*i.e.*, AIDS) developed and the malpractice alleged in this case (*i.e.*, not testing for HIV) occurred within the first few months of life, Petitioner had a longer period of tolling than most minor claimants.

REASONS FOR DENYING WRIT

Consistent with the authority of this Court, the overwhelming majority of federal and state courts reviewing state statutes, applied only to medical malpractice claims and designed to limit malpractice exposure, have used a rational basis test and found no violation of due process or equal protection under the Fourteenth Amendment. *Gronne v. Abrams*, 793 F.2d 74, 77 (2nd Cir. 1986) (non-judicial malpractice panel hearing required); *Davis v. Omitowoju*, 883 F.2d 1155, 1158 (3rd Cir. 1989) (damages cap); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (damages cap); *DiAntonio v. Northampton-Accormack Mem. Hosp.*, 628 F.2d 287, 291 (4th Cir. 1980) (pre-suit notice of intent to sue required); *Lucas v. United States*, 807 F.2d 414, 424 (5th Cir. 1986) (damages cap); *Montagino v. Canale*, 792 F.2d 554, 557 (5th Cir. 1986) (three-year statute of repose from negligent act or omission applicable to minors and adults); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (damages cap); *Douglas v. Stallings*, 870 F.2d 1242, 1249 (7th Cir. 1989) (two-year statute of limitation from negligent act applicable to adults and all minors over age five); *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983) (six-year statute of repose from negligent act or omission unless foreign object); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (two-year statute of limitation from last treatment); *Hoffman v. United States*, 767 F.2d 1431, 1436-37 (9th Cir. 1985) (non-economic damages cap); *Brubaker v. Cavanaugh*, 741 F.2d 318, 322 (10th Cir. 1984) (four-year statute of repose from negligent act). *Reese v. Rankin Fite Mem. Hosp.* 403 So.2d 158 (Ala. 1981) (tolling abolished for minor over age four, minors under age five until eighth birthday); *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d

560, 567-68 (1979) (two-year statute of limitation from injury and four-year statute of repose from act), *app. denied sub nom., Woodward v. Burnham City Hosp.*, 449 U.S. 807, 101 S. Ct. 54 (1980); *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 895 (1980) (no tolling for minors from age six); *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754, 768-69 (1996) (eight-year state of repose applied to minor in medical malpractice action); *Maine Medical Center v. Cote*, 577 A.2d 1173, 1178 (Me. 1990) (six year statute abolishing tolling for minors); *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63, 68, 74 (2001) (seven-year statute of repose for minors); *Bissell v. Kommareddi*, 202 Mich. App. 578, 509 N.W.2d 542, 543 (1993) (no tolling for minors); *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307, 308 (Ct. App. 1980) (less tolling for minors in medical malpractice than other tort actions); *Jones v. Salem Hospital*, 93 Or. App. 252, 762 P.2d 303, 309 (1988) (no tolling for minors); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705, 711 (2002) (no tolling for minors over seven, minors under eight have until tenth birthday); *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, 613 N.W. 2d 849, 872-73 (2000) (no tolling but minors have until at least tenth birthday).

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L.Ed. 2d 511, 96 S. Ct. 2513 (1976).

I. BECAUSE AGE IS NOT A SUSPECT CLASS, THE STATUTE NEEDS ONLY A RATIONAL BASIS.

This Court has repeatedly held in the context of mandatory retirement that classifications based upon age are constitutionally permissible and do not violate the guarantee of equal protection under the Fourteenth Amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 470, 115 L.Ed.2d 410, 111 S. Ct. 2395 (1991) (state judges over age 70); *Vance v. Bradley*, 440 U.S. 93, 97, 59 L.Ed.2d 171, 99 S. Ct. 939 (1979) (foreign service members over age 60); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 49 L.Ed.2d 520, 96 S. Ct. 2562 (1976) (per curiam) (uniformed police officers over age 50). Unlike classifications based upon race and sex, classifications based upon age are so likely to be linked to a legitimate state interest as not to arise from "prejudice or antipathy." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985). By contrast, suspect classes, based upon race and sex, have been subject to a history of harmful discrimination. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 36 L.Ed.2d 16, 93 S. Ct. 1278 (1973).

While this Court has not previously addressed the precise question whether minority alone creates a suspect class, the rationale that the members of the purported class are historically subject to harmful discrimination compels the conclusion that minors are not a suspect class. Minors have traditionally been treated differently than adults but only for their own protection. Though the

elements of history and discrimination are present, the harm is absent.

On facts very similar to this current case the Seventh Circuit Court of Appeals found minors not to constitute a suspect class and no violation of equal protection of the laws or due process of law under the Fourteenth Amendment. *Douglas v. Stallings*, 870 F.2d 1242, 1249 (7th Cir. 1989). In that case Indiana had enacted a medical malpractice statute similar to Georgia's and for the same reasons. In response to increasing medical malpractice premiums discouraging medical doctors from practicing in Indiana, in 1975 the legislature there enacted a two-year statute of limitations for medical malpractice actions to abolish the tolling until majority available in other personal injury and tort claims. An exception was made for minors under age six, who were given until their eighth birthday to file suit. In addition, the date from which the period of limitation ran was changed from date of the injury or of the discovery of the injury to the date of the allegedly negligent act or omission. In 1984, the plaintiff, who had suffered irreversible brain damage during his birth in 1968, sued the obstetrician for negligence in the prenatal and postnatal care.

On those facts the Seventh Circuit in *Douglas* found minors not to constitute a suspect class because they typically benefited from discrimination and upheld the legislation as a legitimate classification based upon youth.[12]

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[12] Any argument that claimants with a latent injury constituted a suspect class would fare no better. *Brubaker v. Cavanaugh*, 741 F.2d 318, 322 (10th Cir. 1984).

> It is because race and national origin are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." [cits. omitted] Legislative classification based on youth, however, is clearly relevant to the state's *parens patriae* responsibilities toward minors.

Id. at 1246.

In so holding the Seventh Circuit in *Douglas* also rejected the heightened or intermediate level of scrutiny typically applied to classifications based upon sex. 870 F.2d at 18. Petitioners' purported authority of this Court for the contrary conclusion consists only of precedent concerning illegitimate children, whose illegitimacy not minority had subjected them to a history of harmful discrimination.[13] *E.g., Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

The highest courts of Alabama, Indiana, Illinois, Kansas, Maine, Massachusetts, Michigan, Virginia, and Wisconsin have employed a similar analysis to the Seventh Circuit

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[13] Plaintiffs also rely upon *Plyler v. Doe*, 457 U.S. 202 (1982), finding a Texas statute barring illegal immigrants from free public education to deny equal protection, but this Court split 4-4 and affirmed the decision below. Without a majority concurring in the opinion, *Plyler* binds only the parties to that case and is not *stare decisis*.

in *Douglas* and found that youth is not a suspect or quasi-suspect class but a legitimate classification where the statutory objectives include reducing old malpractice claims. *Reese v. Rankin Fite Mem. Hosp., supra* at 161; *Anderson v. Wagner, supra* at 310, *app. denied sub nom., Woodward v. Burnham City Hosp., supra* at 807; *Rohrabaugh v. Wagoner, supra* at 665; *Bonin v. Vannaman, supra* at 216; *Maine Medical Center v. Cote, supra* at 1173; *Harlfinger v. Martin, supra* at 48; *Bissell v. Kommareddi, supra* at 581; *Willis v. Mullett, supra* at 661; *Aicher v. Wisconsin Patients Compensation Fund, supra* at 867. North Carolina and Oregon reached similar results under a slightly different analysis where the allegedly prohibited class consisted of all medical malpractice claimants. *Hohn v. Slate, supra* at 627; *Jones v. Salem Hospital, supra* at 259.

Because youth is neither a suspect nor a quasi-suspect class, state legislation affording different treatment to persons on account of their minority is not subject to either strict or heightened scrutiny under an equal protection analysis. Rather the legislative enactment must simply have a rational basis to further a legitimate objective of the state government. Preventing stale medical malpractice claims, lowering medical malpractice insurance costs and assuring an adequate supply of medical doctors are legitimate objectives under the state's police powers.[14]

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[14] "The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment

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II. A CIVIL ACTION IS NOT A FUNDAMENTAL RIGHT.

Fundamental rights, whose exercise the Fourteenth Amendment protects, are those rights which the Constitution of the United States explicitly or implicitly creates. *San Antonio Independent School Dist. v. Rodriguez, supra* at 36. On a case by case basis this Court has determined which rights are created under the Constitution. *E.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to privacy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting rights); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (freedom of association).

By contrast a civil lawsuit does not constitute a fundamental right. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945) (no violation of equal protection where statute of limitations tolled). *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982) (same).

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). They are by definition arbitrary, and their operation does not

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of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole." O.C.G.A. § 9-3-73(f).

> discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. v. Donaldson, *supra* at 314. Because a civil action is not a fundamental right, its abrogation by a statute of limitation or repose need only bear a rational relationship to the legitimate state objective.

All of the United States Circuit Courts of Appeal,[15] which have addressed this issue in the context of legislation reforming medical malpractice actions, have so held that the right to prosecute a civil action is not "fundamental" for purposes of equal protection analysis. *Gronne v. Abrams*, *supra* at 74; *Davis v. Omitowoju*, *supra* at 1158; *Boyd v. Bulala*, *supra* at 1196; *DiAntonio v. Northampton-Accormack Mem. Hosp.*, *supra* at 291; *Montagino v. Canale*, *supra* at 557; *Smith v. Botsford Gen. Hosp.*, *supra* at 520; *Douglas v. Stallings*, *supra* at 1249; *Fitz v. Dolyak*, *supra* at 332; *Hoffman v. United States*, *supra* at 1436.[16]

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[15] These decisions cover all circuits except the First, Eleventh, and District of Columbia.

[16] *Contra*, *Katz v. Children's Hospital*, 283 F.3d 1520, 1528 (9th Cir. 1994). The Ninth Circuit in this diversity case was predicting how California's highest appellate court would have ruled.

See Brubaker v. Cavanaugh, supra at 321. That the state might have chosen some means other than abolishing tolling for young minors until age seven or age ten and disallowing unknown claims after five years in an effort to rectify problems associated with medical malpractice insurance should not concern this Court under a rational basis analysis.

III. STATUTES OF LIMITATION, NEITHER TOLLING CLAIMS FOR MINORS NOR RUNNING FROM DISCOVERY, DO NOT VIOLATE DUE PROCESS.

Contrary to Petitioners' assertions, due process of law under the Fourteenth Amendment does not require tolling of the statute of limitations for minors or incompetent persons or until discovery of the claim. Rather "[d]ue process in the modification of procedural rules is provided by the legislature itself, subject to a minimal requirement of rationality." *Douglas v. Stallings, supra* at 1250. In seeking adjudication here Petitioners are really asking this Court to balance in their favor the competing interests involved in this suit, namely their alleged inability to bring the claim on or before November 10, 1994 (*i.e.*, Petitioner Derek Canas' seventh birthday) against Respondent's need not to face prosecution now for an alleged wrong committed on March 22, 1985 (*i.e.*, date HIV testing first available at MCG). Weighing these and other interests, like the affordability of malpractice insurance and the availability of medical doctors within a state, is better left to the state legislature.

Where no vested right to personal or real property is concerned, "a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a state of

limitations. . . ." *Chase Securities Corp. v. Donaldson*, *supra* at 311. In *Campbell v. Holt*, 115 U.S. 620, 29 L.Ed. 483, 6 S. Ct. 209 (1885) this Court upheld against a due process challenge a state statute abolishing the period of limitation and in effect depriving the defendant there of a viable defense to the claim. In *Wheeler v. Jackson*, 137 U.S. 245, 255, 34 L.Ed. 659, 11 S. Ct. 76 (1890), a statute shortening the time in which to bring an action to six months was approved as not violating the due process requirements of the Fourteenth Amendment.

> [T]he legislature . . . may shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all circumstances into consideration be given by the new law for the commencement of suit before the bar takes effect.

137 U.S. at 255. This deference by the federal courts to the state legislatures is premised upon the overwhelming state interest but minimal federal interest in tort law. "[T]he state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282, 62 L.Ed.2d 481, 100 S. Ct. 553 (1980) (sovereign immunity no violation of due process).

In Petitioner's case his cause of action arose on March 22, 1985, when he first could have been tested for and shown positive for HIV.[17] Under then existing law, allowing

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[17] If AIDS rather than HIV were considered the injury, the statute would have begun running when Petitioner Derek Canas reached age

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tolling during minority, Petitioner then had two years after his eighteenth birthday, or until November 10, 2004, to bring suit. O.C.G.A. § 9-3-90; former Code § 3-1102.[18] When tolling was abolished for minors over age five in medical malpractice actions, effective July 1, 1987, Petitioner who was then between two and three years old, had until his seventh birthday, or November 10, 1991, to file this action.[19] Since by his own expert's testimony Petitioner Derek Canas displayed obvious symptoms of AIDS by age one or two, providing him with at least another four years in which to bring an action was not unreasonable. Because the legislature provided a reasonable amount of time to prosecute the action, shortening the statute of limitation by abolishing tolling until the age of majority in medical malpractice actions is not "wholly arbitrary or irrational" and does not violate due process.

That Petitioners allegedly did not know that they had a claim before it actually expired does not make the statutes of limitation and repose irrational and so deny them due process of law under the Fourteenth Amendment. *Douglas v. Stallings*, *supra* at 1249. *Fitz v. Dolyak*, *supra* at 333; *Jewson v. Mayo Clinic*, *supra* at 412. *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400

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one or age two on November 10, 1985, or 1986, but the analysis would be no different.

[18] If former Code § 3-1102 were not applied, the two-year general statute of limitations for personal injury at O.C.G.A. § 9-3-33 would apply, and the result would be the same.

[19] The statute also provided a two-year grace period until July 1, 1989, if the new provisions, taking effect on July 1, 1987, barred a claim permitted under the former law. § 9-3-73(g). The grace period is not relevant to this case because Petitioner's claim was not barred on July 1, 1987, by the new statute.

U.S. 993, 91 S. Ct. 461, 27 L.Ed.2d 441. Even if such a harsh result occurred under the facts of this particular case, this result is necessary to avoid old claims in many other situations.

IV. THE STATE LEGISLATURE LIMITED TOLLING FOR MINORS AND REFUSED TO ADOPT A DISCOVERY RULE AS A VALID EXERCISE OF ITS SOVEREIGNTY.

In three separate legislative sessions spanning two decades, the state legislature has modified the procedural rules respecting the limitation of medical malpractice actions in order to curtail lengthy exposure from claims, to lower insurance costs, and to maintain affordable medical care. A review of the legislative development of current medical malpractice statutes of limitation and repose at §§ 9-3-71 and 9-3-73 in the context of prevailing judicial authority demonstrates this consistent purpose. Until 1976 Georgia had no special statute of limitation, applicable only to medical malpractice actions, and medical malpractice claims, like all other personal injury claims, were governed by a two-year statute running from when the cause of action accrued. § 9-3-33, former Code § 3-1004. Since a cause of action accrues when the last essential element of the action first arises, the date of the injury commonly triggered the statute of limitation in medical malpractice actions.

In the late 1960's and early 1970's, Georgia courts expanded the rights of personal injury claimants by adopting both a continuing tort rule, *Parker v. Vaughan*, 124 Ga. App. 300, 183 S.E.2d 605 (1971) (foreign object), *Forgay v. Tucker*, 128 Ga. App. 497, 197 S.E.2d 492 (1973), *Piedmont Pharmacy v. Patmore*, 144 Ga. App. 160, 240

S.E.2d 888 (1977), and a discovery rule. *Everhart v. Rich's*, 229 Ga. 798, 194 S.E.2d 425 (1972). Amid concerns that medical malpractice claims arising years later would destabilize insurance, the General Assembly responded in 1976 to these judicial developments by enacting a special statute of limitation applicable only to medical malpractice actions and providing that the two-year period of limitation ran from the alleged occurrence, not the injury. Former Code § 3-1102. The 1976 legislation specifically incorporated the tolling provisions for minors until the age of majority. Former Code § 3-1104.

Following some initial unsuccessful constitutional challenges, *Hamby v. Neurological Assoc.*, 243 Ga. 698, 256 S.E.2d 378 (1979), the Supreme Court of Georgia eventually determined in 1983 and 1984 that running the statute of limitation from the date of the occurrence rather than from the date of the injury violated equal protection under certain circumstances. *Shessel v. Stroup*, 253 Ga. 56, 59, 316 S.E.2d 155, 158 (1984). *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983). Again amid concerns about medical malpractice insurance, the state legislature responded in 1985 by amending the medical malpractice statute to include a five-year statute of repose from the date of the negligent act while reverting to the date of injury or death for triggering the statute of limitation. § 9-3-71. Still no change was made in the tolling provision for minors at former Code § 3-801. *See Quinn v. Stafford*, 257 Ga. 608, 610, 362 S.E.2d 49, 51 (1987).

Then in 1987 because of the remaining "long-tail" exposure caused by tolled claims from minors, the Georgia legislature enacted the current statute, which abolishes tolling for minors over age five and limits tolling for minors under age five to the seventh birthday for the

statute of limitation and the tenth birthday for the statute of repose. It was against this background that the Supreme Court of Georgia found no constitutional violation under the Fourteenth Amendment in *Crowe v. Humana*, 263 Ga. 833, 834, 439 S.E.2d 654, 655 (1994) (grace period approved) and in *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 570, 423 S.E.2d 235, 239 (1992).

> We have no difficulty concluding that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives. Before the 1987 amendment of § 9-3-73, minors . . . whose cause of action accrued at birth . . . could wait up to 18 years before the medical malpractice statute of limitation began to run. It appears from subsection (f) of § 9-3-73 that the General Assembly may have perceived the onset of a crisis in this state's health care industry, and that a method of meeting the crisis was to reduce minors' period of disability from eighteen to five years, thereby limiting the period within which minors could bring medical malpractice claims. The reduction of the period within which minors could bring suit certainly would tend to achieve the stated legislative objectives, as, *e.g.*, it would tend to prevent stale medical malpractice claims, and would also tend to lower insurance and medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit.

262 Ga. at 570-71. Petitioners are asking this Court to ignore the history of this legislation and to substitute their judgment for the legislature's.

V. THERE IS NO MEANINGFUL LACK OF UNIFORMITY AMONG STATE APPELLATE AND FEDERAL CIRCUIT COURTS.

The decisions of the highest state courts on the federal question whether abolishing tolling for minors until the age of majority in only medical malpractice but not other tort actions violates equal protection or due process of law under the Fourteenth Amendment are uniform. Other than Georgia, all states addressing this question (*i.e.*, Illinois, Kansas, Maine, Massachusetts, Michigan, and Oregon[20]) have found no violation of the Fourteenth Amendment. Petitioners are correct that the appellate courts of two states[21] (*i.e.*, New Mexico and South Dakota[22]) have found that the two-tier medical malpractice statutes of repose or limitation deprive older minors of equal protection or due process under the Fourteenth Amendment to the United States Constitution although five (*i.e.*, Alabama, Georgia, Indiana,[23] Virginia, and Wisconsin[24])

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[20] *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d 560, 567-68 (1979). *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754, 768-69 (1996). *Maine Medical Center v. Cote*, 577 A.2d 1173, 1178 (Me. 1990). *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63, 68, 74 (2001). *Bissell v. Kommareddi*, 202 Mich. App. 578, 509 N.W.2d 542, 543 (1993). *Jones v. Salem Hospital*, 93 Or. App. 252, 762 P.2d 303, 309 (1988).

[21] *Katz v. Children's Hospital* is excluded for reasons stated in footnote 15.

[22] *Jamarillo v. Heaton*, 136 N.M. 498, 100 P.3d 204 (Court Appeals 2004); *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S.D. 1989).

[23] A seemingly contrary decision in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) rests upon the Indiana Constitution.

[24] *Reese v. Rankin Fite Mem. Hosp.* 403 So.2d 158 (Ala. 1981); *Crowe v. Humana Hospital*, 263 Ga. 833, 439 S.E.2d 654 (1994); *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 895 (1980); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705, 711 (2002); *Aicher v.*

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have not. Still the rulings on the federal Constitution in the New Mexico and South Dakota cases were unnecessary, since the appellate courts also found the statute in question to violate its own state constitution. Rather the lack of uniformity, alleged by Petitioners, arises primarily out of these appellate courts' consideration of differing statutes under varying constructions of the constitutions of the individual states.[25]

Wisconsin Patients Compensation Fund, 237 Wis. 2d 99, 613 N.W.2d 849, 872-73 (2000).

[25] Following in alphabetic order by state are decisions from Arizona, Colorado, Missouri, New Hampshire, Ohio, Texas, and Utah finding a medical malpractice statute of limitation or repose to violate equal protection, due process, of some other provision under its own *state* constitution. "We . . . hold that the statute violates . . . the Arizona Constitution. . . . [F]ederal authority is cited only for the purpose of guidance and not because it compels the result which we reach. . . ." *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961, 963 (1984) (three-year statute of repose applied to adult plaintiff). "We . . . hold that the medical malpractice statute violates the equal protection provisions of our [state] constitution. . . ." *Austin v. Litvak*, 682 P.2d 41, 52 (1984) (three-year general statute of repose, applicable to adult plaintiff, allowed longer period where foreign object left in body). "The statutory limitation period, as applied to minors, violates their right of access to our courts under [Missouri] Const. . . ." *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, 15 (Mo. 1986) (four-year statute of repose applied to minors from age ten). "In interpreting our State Constitution, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires." *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980) (two-year statute of limitation allowed longer period only where foreign object left in body; minor less than eight required to bring action by tenth birthday.) "[W]e hold that [the statute] is unconstitutional because it violates the right of medical malpractice litigants who are minors to 'equal protection.' Section 2, Article I of the Ohio Constitution." *Schwan v. Riverside Methodist Hospital*, 6 Ohio St.3d 300, 452 N.E.2d 1337, 1338 (1983) (four-year statute of repose allowed minors under age ten to file suit up to fourteenth birthday). "The single issue raised . . . is whether [the statute], as applied to minors, violates the due process or due course of

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CONCLUSION

The decisions of state and federal appellate courts do not genuinely reflect lack of uniformity on the questions presented. Rather they show that similar and sometimes almost identical statutes, enacted for the purpose of addressing problems associated with medical malpractice insurance, have consistently met the requirements of equal protection and due process under the Fourteenth Amendment. Petitioners dispute how the state legislature chose to balance the competing interests in medical malpractice actions and argue passionately, as did some legislators in Georgia, that the insurers concocted a crisis in order to change the law. The Petition for Certiorari asks this Court to act as a super-legislature, but the function of this Court under these circumstances is to determine whether the legislation meets the requirements of equal protection and due process under the Fourteenth Amendment. This Court has never previously considered youth a suspect class or prosecution of a civil lawsuit a fundamental right for purposes of equal protection. This Court has consistently allowed sovereign states to shorten or repeal statutes of limitation without violating due process and has never demanded anything close to a seven-year grace period. Petitioners, who were bringing their medical malpractice action under state law, were required to file

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law provisions of the Ohio Constitution. . . ." *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717, 719 (1986) (same). "What remains for our determination is whether article 5.82, section 4, is violative of . . . the Texas Constitution." *Sax v. Votteler*, 26 Tex. Sup. J. 316, 648 S.W.2d 661, 664 (1983) (two-year statute of limitation applied to minors from age six). "[W]e hold [the statute] unconstitutional under . . . the Utah Constitution." *Lee v. Gaufin*, 227 Utah Adv. Rep. 3, 867 P.2d 572, 589 (1993) (two-year period of limitation from discovery of the injury and four-year period of repose after the negligent act applied to minors).

the claim within about seven years but failed to do so and are in the best position to bear the consequences of their failure. Therefore, Respondent asks this Court to deny the Writ of Certiorari.

Respectfully submitted,

THURBERT E. BAKER
Attorney General
Georgia Bar No. 033887

KATHLEEN M. PACIOUS
Deputy Attorney General
Georgia Bar No. 558555

BRYAN F. DORSEY
Counsel of Record
Special Assistant Attorney General
Georgia Bar No. 226150
Attorneys for Respondent
Board of Regents

LAW OFFICES OF BRYAN F. DORSEY
2876 Johnson Ferry Road, NE,
Suite 200
Marietta, GA 30062
770-594-3320

APPENDIX A

U. S. Const. Amend. XIV, Sec. 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Georgia Const. Art. VI, § V, Para. III

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other

courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

O.C.G.A. § 9-3-33, former Code § 3-1004. General statute of limitation for personal injuries

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

O.C.G.A. § 9-3-71. Medical malpractice statute of limitation and repose

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal *Code Section 9-3-73*,

which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-72. Special statute for foreign objects

The limitations of *Code Section 9-3-71* shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission is discovered. For the purposes of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

O.C.G.A. § 9-3-73. Special statute for minors

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of mental retardation or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor:

(A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or

(B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by *Code Section 9-3-72*.

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice

claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989.

O.C.G.A. § 9-3-90, former Code § 3-801. Tolling for minors

(a) Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

Former Code § 3-1102. Medical malpractice statute of limitation (repealed)

Except as otherwise provided in this Chapter, an action for medical malpractice shall be brought within two years after the date on which the negligent or wrongful act or omission occurred.

Former Code § 3-1103. Special statute for foreign objects (repealed)

None of the limitations of section 3-1102 shall apply where a foreign object has been left in a patient's body, but an

action shall then be brought within one year after such negligent or wrongful act or omission is discovered. For purposes of this section, "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Former Code § 3-1104. Tolling for minors in medical malpractice (repealed)

The disabilities and exceptions prescribed in Chapter 3-8 in limiting actions on contracts shall be allowed and held applicable to action, whether in tort or contract, for medical malpractice.

(3)

No. 05-1671

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR RESPONDENTS AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., AND MCG HEALTH, INC.

WILLIAM P. FRANKLIN, JR.
LESLIE PICKETT SHEEHAN
OLIVER MANER & GRAY LLP
P.O. Box 10186
Savannah, GA 31412

Attorneys for Respondent Ayman Al-Jabi, M.D.

JAMES S. V. WESTON
HULL, TOWILL, NORMAN,
BARRETT & SALLEY
P.O. Box 1564
Augusta, GA 30903-1564

Attorneys for Respondent MCG Health, Inc.

ADAM L. APPEL*
KIM M. RUDER
CARLOCK COPELAND
SEMLER & STAIR, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, GA 30303
(404) 522-8220

Attorneys for Respondent Sharon J. Kaminer, M.D.

* *Counsel of Record*

STATEMENT PURSUANT TO RULE 29.6

Respondent, MCG Health, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This medical malpractice case arises out of one or more blood transfusions allegedly contaminated with HIV/AIDS that were administered to Petitioner Derek Canas ("Derek") when he was two months old. Derek received these blood transfusions at the MCG Hospital in Augusta, Georgia in January and February 1985, shortly before the FDA began screening blood for the HIV/AIDS virus. Derek was diagnosed with HIV sixteen years later in April 2001.

Petitioners filed suit against four defendants: (1) Dr. Sharon J. Kaminer, Derek's pediatric cardiologist who treated Derek at the Medical College of Georgia ("MCG") from 1991-2001; (2) The Board of Regents of the University System of Georgia d/b/a Medical College of Georgia ("BOR")[1] (Dr. Kaminer's employer at the time she treated Derek); (3) Dr. Ayman Al-Jabi, Derek's pediatrician from 1993-2000; and (4) MCG Health, Inc. ("MCGHI")[2], the entity that began operating the MCG Hospital on July 1, 2000, pursuant to a series of contracts with the BOR.

1. *Derek's Heart Procedure in 1985*

On January 18, 1985, six years before Derek's first appointment with Dr. Kaminer and eight years before his first appointment with Dr. Al-Jabi, Derek underwent a heart surgery to correct the transposition of his great arteries and his total anomalous venous return condition. As a result of the heart procedure and certain complications, Derek received multiple blood or blood product transfusions in January and February of 1985, which were allegedly tainted with HIV. Petitioners contend that Drs. Kaminer and Al-Jabi failed to recognize that, beginning as early as 1994, Derek had symptoms of HIV, and that they failed to have him tested or referred to a doctor for testing in a timely fashion.

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1. This Brief is filed jointly by all Respondents with the exception of the BOR, which elected to file its own Brief.

2. MCGHI is a 501(c)(3) non-profit corporation. Prior to July 1, 2000, MCGHI did not manage, own, lease, or operate the MCG Hospital. And, at no time has MCGHI ever employed any of the attending physicians, including Dr. Kaminer.

2. *Drs. Kaminer and Al-Jabi's Treatment of Derek*

Dr. Kaminer, at all relevant times, was a Pediatric Cardiologist at MCG. As a pediatric cardiologist, she was primarily responsible for Derek's cardiovascular care. She treated Derek from May 30, 1991, when Derek was approximately six years old, until February 15, 2001 (with a gap in treatment from 1996-2000).[3] When Derek went to MCG's Cardiovascular Clinic, Dr. Kaminer performed a routine cardiac physical exam, which included monitoring the pacemaker that was placed during his 1985 surgery. Dr. Al-Jabi was Derek's pediatrician who began seeing Derek in May of 1993. He last saw Derek in March of 2000. Throughout the time Dr. Al-Jabi followed Derek, he treated Derek for routine childhood illnesses, such as bronchitis, rhinitis, colds, respiratory infections or ear infections.

3. *Timing of Alleged Malpractice Committed by Drs. Kaminer and Al-Jabi*

Significantly absent from Petitioners' recitation of facts is the evidence from their expert witnesses regarding the alleged malpractice committed by Drs. Al-Jabi and Kaminer ("the Doctors"). The Petitioners' experts testified that a number of events should have raised red flags in the Doctors' minds that Derek was potentially HIV positive. Petitioners' experts contend that, in response to these red flags, the Doctors should have either referred Derek to a specialist for further evaluation or conducted further testing on their own.

Most significantly, Dr. Sleasman testified that Derek's treating physicians should have recognized, no later than 1994, that Derek had signs and symptoms consistent with HIV.[4]

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3. Dr. Kaminer saw Derek at approximate one-year intervals between May of 1991 and August of 1996. From August of 1996 and February of 2000, Derek's parents did not bring him to the MCG Cardiovascular Clinic for any exam or treatment, for reasons unknown to Dr. Kaminer. Derek then returned to see Dr. Kaminer on February 17, 2000 and she followed his care until his last visit on February 15, 2001.

4. Notably, Petitioners' experts have testified that Derek suffered from signs and symptoms of HIV/AIDS consistently from the time of his blood transfusions in early 1985.

Dr. Sleasman testified that, in addition to suffering from stunted growth, Derek had "recurrent pneumonia/ bronchitis, . . . chronic persistent diarrhea, which was called irritable bowel syndrome, and . . . persistent gingivostomatitis. Those were the four things that fulfilled the CDC criteria for HIV-associated conditions." According to Dr. Milligan, the Doctors should have recognized that Derek had stunted growth and should have made a referral to a medical specialist to evaluate the stunted growth when Derek was nine and one-half years old (or in 1994). Petitioners claim that, following 1994, the Doctors continued to fail to recognize or investigate Derek's HIV-related symptoms.

Petitioners filed suit on December 28, 2001, against Drs. Kaminer and Al-Jabi, almost two years after the five-year Georgia medical malpractice statute of repose expired (in the fourth quarter of 1999), and five years after the two-year Georgia medical malpractice statute of limitations expired (in the fourth quarter of 1996).[5] Each Respondent subsequently filed motions for summary judgment based upon the expiration of the statutes of repose and limitations (O.C.G.A. §§ 9-3-71 and 9-3-73). On September 19, 2005, the trial court entered an order partially granting and partially denying Respondents' motions. That order is currently pending on appeal before the Georgia Court of Appeals.

In a separate order dated October 14, 2005, the trial court expressly upheld the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, as these statutes apply to medical malpractice claims of minors. Petitioners directly appealed this order to the Georgia Supreme Court, raising the same constitutional arguments being made before this Court. On February 27, 2006, the Georgia Supreme Court issued an order transferring the case to the Georgia Court of Appeals, holding that it had previously addressed and rejected the Petitioners' constitutional challenges to the subject statutes. Petitioners filed a motion for reconsideration before the Georgia Supreme Court, which was denied on April 13, 2006. Petitioners then filed the instant Petition for a Writ of Certiorari to this Court.

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5. The Complaint was later amended to add the BOR and MCGHI.

REASONS FOR DENYING THE PETITION

I. *This Court Does Not Have Jurisdiction to Review the Constitutionality of The Georgia Medical Malpractice Statutes of Repose and Limitations As There Is No "Final Judgment" As Required By 28 U.S.C. § 1257*

In support of their contention that this Court has jurisdiction to entertain the constitutional challenges raised in their Petition, Petitioners rely entirely upon 28 U.S.C. § 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (without analysis or discussion), in support of their contention that the Georgia Supreme Court order issued on February 27, 2006 was a "final judgment". Petitioners are in error.

The statute cited by Petitioners, 28 U.S.C. § 1257(a), provides:

> Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. In defining the concept of finality, this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) undertook a detailed analysis of the concept and identified four categories of judgments in which finality existed such that this Court could exercise jurisdiction.

By way of background, in *Cox Broadcasting*, the appellant reporter, who was employed by a television station owned by the appellant broadcasting company, broadcasted the name of a rape victim during a news report. *Id.* at 473-74 (the identity of the victim was obtained from indictments, which were

public records). At the time of the broadcast, there was a criminal statute in place which made it a misdemeanor to broadcast a rape victim's name. *Id.* at 472. Following the broadcast, the rape victim's father filed suit against the reporter and his employer claiming a violation of the statute and a violation of his right to privacy. *Id.* at 474.

The trial court rejected the appellant's claim that the broadcast was privileged under both the First and Fourteenth Amendments. *Id.* at 474. The trial court further found that the criminal statute afforded the father a civil remedy and granted him summary judgment (finding that liability was established in the father's favor and that the determination as to damages would be determined at trial). *Id.* The reporter and Cox Broadcasting appealed to the Georgia Supreme Court, which "felt compelled to determine the constitutionality of the statute and sustained it as a 'legitimate limitation on the right of freedom of expression contained in the First Amendment.'" *Id.* at 475. The Georgia Supreme Court could discern "'no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.'" *Id.* The reporter and Cox Broadcasting filed a petition for certiorari to this Court.

Before addressing the merits of appellants' claims as to the constitutionality of the rape victim statute, this Court analyzed whether it in fact had jurisdiction to entertain the Appellants' arguments. The Court began by noting that it only had power to review cases in which the state's highest court had issued a "[f]inal judgment or decree" in accordance with 28 U.S.C. 1257. *Id.* at 476 (noting that this statute limits the Court's power to review cases coming from state courts).

In assessing whether the Georgia Supreme Court's pronouncement was a final judgment on a constitutional issue, this Court noted that there "are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the

completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477-78.

The four categories are:

> [(1)] those cases in which there are further proceedings-even entire trials-yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained . . . [(2) cases in which] the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings . . . [(3) cases] where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case . . . [and (4)] those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 479-83.

Based on the facts before it, the Court found that a final judgment did in fact exist for purposes of exercising jurisdiction. *Id.* at 485. More specifically, the Court found that the "Georgia Supreme Court decision is plainly final on the federal issue and is not subject to further review in the state courts." *Id.* The Court further explained that "[a]ppellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the

statute, there should be no trial at all." *Id.* The Court further reasoned that:

> [i]f appellants prevail at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim . . . may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim . . . will 'leave unanswered an important question of freedom of the press under the First Amendment. . . . On the other hand, if we now hold that the First and Fourteenth Amendment bar civil liability . . . this litigation ends.

Id. at 486. Essentially, the Court found a final judgment under the fourth category described above.

In the instant Petition, the current status of the litigation posture does not support this Court's exercising jurisdiction under the final judgment rule. Respondents address each category in turn below.

A. Category 1: "those cases in which there are further proceedings-even entire trials-yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained."

The federal issue claimed in the Petition pertains to the constitutionality of the medical malpractice statutes of limitation and repose as they apply to minors. Regardless of whether this Court were to either uphold or reverse the proclamation of constitutionality, this case will undoubtedly continue in one form or another, both in the appeals process and before the trial court. More specifically, following the Georgia Supreme Court's opinion of February 27, 2006, upholding the constitutionality of the statutes, the Georgia Supreme Court transferred the case to the Georgia Court of Appeal for further disposition. Depending upon the outcome

of that appeal, the case will either be transferred back to the trial court for further proceedings or will likely be appealed to the Georgia Supreme Court by writ of certiorari. Hence, regardless of this Court's position on the constitutionality of the statutes, the case will not end before this Court. Additionally, there are other claims pending before the trial court that were not subject to either of the pending appeals. For this reason, this case does not satisfy the first category of final judgments.

B. Category 2: "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."

In discussing this category, *Cox Broadcasting* identified *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) as an exemplary case. In *Johnson*, a party filed suit to prevent the transfer of operation of a radio station pursuant to a lease. The basis of the lawsuit was premised upon fraud. While the suit was pending, the Federal Communications Commission ("FCC") consented to the transfer of the license to operate the radio station.

The matter was appealed to the Nebraska Supreme Court which reversed (and entered judgment for the respondent), holding that the lease and license be set aside and that the original status of the parties be restored. The Nebraska Supreme Court further ordered an accounting of the operation of the station by the lessee and that the income less operation expenses be returned to the lessor. *Id.* at 122. On a motion for reconsideration, the petitioners asserted that only the FCC and the federal courts had jurisdiction. Denying the motion, the court clarified that the former opinion only vacated the *lease* of the radio station (as opposing to rendering an opinion on (licencing). *Id.* at 123 (acknowledging that issues of "licensing" or transferring of license/annulling licenses are powers reserved for the FCC).

This Court, in addressing the jurisdictional issue, found that "[b]ecause of the importance of the contention that the state court's decision had invaded the domain of the Federal

Communications Commission, we grant certiorari." *Id.* In support of granting certiorari, the Court essentially found that the pronouncement of the state supreme court essentially left nothing further to be done in the state court besides the accounting, such that there was finality. *Id.* at 125-27 (noting that the accounting left to be done in the trial court could not remotely raise federal questions such that the Court would have another opportunity to hear it); *see also Brady v. Maryland*, 373 U.S. 83, 85, n.1 (1963)(post-conviction motion for new trial based on evidence withheld by prosecution; found finality of judgment in that issue of retrial is a question independent of and unaffected by what may transpire in a trial); *Carondelet Canal & Navigation Co. v. State of Louisiana*, 233 U.S. 362 (1914).

Unlike *Radio Station WOW*, and as discussed *supra* in Section A, regardless of this Court's ruling in this case, there remains much litigation left in the underlying suit. This includes the matters pending before the Georgia Court of Appeals, the petition for certiorari to the Georgia Supreme Court following the Georgia Court of Appeals opinion (and to this Court) and a trial on issues and claims not subject to either of the instant appeals. Moreover, a resolution of the state law claims pending before the Georgia Court of Appeals could also moot the constitutional issues presented to this Court by finding that Petitioners' claims are not barred by either statute. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Simply stated, there in no finality. *See generally Florida v. Thomas*, 532 U.S. 774 (2001) (finding no finality and noting Court could not assume that federal question would not later be presented to the Court). The second class of finality of judgment simply does not fit the facts before this Court.

C. Category 3: "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."

In this category of cases, as discussed by *Cox Broadcasting*, the parties, after having their case remanded to the state courts, have no further ability or avenue in which to bring the

constitutional issue back before this court. *Cox Broadcasting*, 420 U.S. at 481-82. More specifically stated, "[t]he federal issue would not survive the remand." *Id.* at 482 (citing *State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156 (1973)).

This category does not apply to the facts before this Court. As stated earlier, the posture of this case is unique in that there is also currently an appeal pending before the Georgia Court of Appeals. More specifically, upon the Georgia Supreme Court's affirming the constitutionality of the statutes of repose and limitations, it transferred the appeal to the Georgia Court of Appeals for resolution of the remaining issues in the case (i.e., what part of Petitioners' claims, if any, are barred by the Georgia statutes of repose and limitations). Given that the case is currently pending in the Georgia Court Appeals, further appeal to this Court is possible and quite probable.

When the Georgia Court of Appeals rules, the losing party (or parties) can petition the Georgia Supreme Court for certiorari. If that petition is denied, the party is entitled to again petition this Court for certiorari. *See* Rule 38(b)(1) of the Georgia Court of Appeals, which states in pertinent part: "Notice of intention to petition for certiorari shall be filed with the Clerk of this Court within 20 days after denial of a writ of certiorari by the Supreme Court of Georgia." At that point, this Court will then have the ability and option to address the constitutional issues presented in the current Petition. Alternatively, if the Georgia Supreme Court grants certiorari, upon issuing an opinion, either party may petition this Court for certiorari in accordance with 28 U.S.C. § 1257. *See generally Florida v. Thomas*, 532 U.S. 774 (2001) (finding no final judgment and noting that review of question could be had a later date in the case under the third category); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997) (finding that constitutional issues may come before court at a later time in the litigation process and declining to find a final judgment).

D. Category 4: "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come."

In discussing this category, the *Cox Broadcasting* Court identified *Local No. 438 Construction & General Laborers' Union et al. v. Curry*, 371 U.S. 542 (1963). *Cox Broadcasting*, 420 U.S. at 483-84. In *Curry*, the Georgia Supreme Court upheld an injunction against a labor union's picketing of a construction site. The entry of the injunction was premised on an alleged violation of Georgia's right to work statute. *Curry*, 371 U.S. at 545. In contesting the injunction, the labor union claimed that the Georgia courts did not have jurisdiction to enter an injunction because the exclusive jurisdiction of the National Labor Relations Board preempted the entire litigation. *Id.*

In finding that it had jurisdiction under § 1257, the Court identified the relevant issues as "[w]hether or not the Georgia courts have power to issue an injunction[.]" *Id.* at 548. This issue was "wholly separate from and independent of the merits of respondents' cause" (i.e. "the legality of the union's picketing"). *Id.* at 548-550. The Court also found that "unless this judgment is reviewable now, petitioners will inevitably remain subject to the issuance of the temporary injunction ... and must face further proceedings in the state courts which the state courts have no power to conduct." *Id.*

The Court also found an additional independent basis for jurisdiction. The Court determined that "for all practical purposes the litigation in the Georgia courts terminated" with the issuance of the Georgia Supreme Court opinion. *Id.* at 551. The Georgia Supreme Court "not only finally asserted its

power to deal with the subject matter of this suit, but it also resolved the merits of the issues raised in the course of the hearing upon the temporary injunction." *Id.* Moreover, the petitioners admitted that there were no further factual or legal issues pending in the Georgia trial court. *Id.*

Unlike *Curry*, even should the statutes of repose and limitations be found to be unconstitutional, there will still remain an entire trial on the merits in the trial court. A reversal of the Georgia Supreme Court will not be "preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-83. Rather, it would only serve to broaden the scope of evidence to support Petitioners' claim for medical malpractice against the Respondents (i.e., allowing a claim for liability that occurred more than five years before Petitioners filed suit.). *See also Curry*, 371 U.S. at 551 (noting that there was no remaining litigation pending in the Georgia courts); *Cox Broadcasting*, 420 U.S. at 485 (finding that "if the Georgia court erroneously upheld the statute, there should be no trial at all" and that "the litigation could be terminated by [the Supreme Court's] decision on the merits").

Because the facts before this Court do not satisfy any of the four categories of "finality", this Court cannot take jurisdiction to entertain Petitioners' constitutional questions.

II. *The Georgia Statutes Do Not Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.*

The federal constitutional issue in the petition is: do Georgia's statutes of limitations and repose applicable to a minor's medical malpractice claim violate the equal protection and due process clauses of the Fourteenth Amendment? The Petitioners contend that the statutes are unconstitutional because, unlike the general statute of limitations for personal injury actions, they require a minor to file a medical malpractice case before he reaches majority. The Petitioners specifically argue that the Fourteenth Amendment precludes the State of Georgia from expecting or requiring a minor "to discern when a medically negligent act has occurred." (Petition, p. 11.) They further claim that review is warranted

because other state courts have declared similar statutes unconstitutional. (Petition, pp. 19-30).

The Respondents explain below why the Petition does not warrant review. First, the Respondents show that the Georgia statutes do not deny the Petitioners equal protection or due process. Second, the Respondents distinguish those state court cases that the Petitioners claim support review.

A. *Equal Protection*

The threshold issue in analyzing the Petitioners' equal protection challenge is what level of scrutiny applies to the Georgia statutory classifications. The Petitioners contend that "heightened intermediate scrutiny" should apply. (Petition, pp. 25-30.) They cite no decisions of this Court which impose a heightened level of scrutiny for statutes that limit a minor's right to pursue a medical malpractice claim. Instead, they essentially argue that the Georgia Supreme Court erred in upholding the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73 because such a ruling is inconsistent with its own prior decisions. (Petition, pp. 12-17.)

Thus, the issue remains: what level of scrutiny applies to statutes that supplant general tolling provisions and require a minor to bring a medical malpractice action before he reaches majority? The Seventh Circuit Court of Appeals addressed this issue in *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989). There, the parents of a disabled child filed a medical malpractice case against the estate and professional corporation of the physician who delivered the child. As a result of the physician's alleged negligence, the child sustained irreversible brain damage. The alleged negligence occurred in Indiana and, therefore, the Indiana statute of limitations applied. The Indiana statute provided a two-year limitations period for medical malpractice cases, except that "[i]f the injury occurs to a minor under the age of six, the action may be commenced any time before the child's eighth birthday." *Id.* at 1244, citing Ind. Code § 16-9.5-3-1. Under the pertinent facts, the parents had until 1977 to file suit, but they did not do so until 1984. The district court found that the Indiana statute of limitations barred the parents' action and awarded

summary judgment to the defendants. On appeal, the parents argued that the Indiana statute violated the equal protection and due process clauses of the Fourteenth Amendment, because minors such as their child "who will never be free of their legal disability . . . should be treated as a suspect class warranting strict scrutiny, or at a minimum, as a quasi-suspect class requiring heightened scrutiny." *Douglas*, 870 F.2d at 1245.

The Seventh Circuit began by identifying the proper level of scrutiny to apply.

> The success of plaintiffs' equal protection challenge to the malpractice statute of limitations turns on the level of scrutiny applied to the statutory classification. Economic or social legislation which does not involve suspect classifications or infringe on a fundamental interest is presumed constitutional and will be upheld if it is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). It is a rare statute, indeed, which cannot withstand the minimal rational relationship analysis. *But see, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

Douglas, 870 F.2d at 1245. Judge Cummings noted that the parents "have chosen an uphill battle in trying to persuade this Court that persons legally disabled because of minority and mental incapacity are a suspect classification." *Id.* The court rejected the parents' attempt to analogize the classification of mentally incompetent minors "to that of illegitimate children, who have been recognized by the Supreme Court as a quasi-suspect class warranting heightened scrutiny." *Id.* at 1246. In *City of Cleburne, supra*, this Court specifically declined "to extend either strict or heightened review to classifications involving the mentally retarded." *Douglas*, 870 F.2d at 1246, *citing City of Cleburne*, 473 U.S. at 446.

The Seventh Circuit then turned to classifications based on age.

> **Likewise, statutes which classify on the basis of age are subject only to the minimal rational relationship review.** 'While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereo-typed characteristics not truly indicative of their abilities.' *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976). Although the classification contained in the malpractice statute of limitations disadvantages minors rather than the elderly as in *Murgia*, **the reasoning behind the Supreme Court's refusal to extend heightened scrutiny to classifications of the aged applies equally to this statute disadvantaging minors; i.e., when the characteristics of a statutory classification are relevant to the legitimate interests of the State, the judiciary need not closely scrutinize the legislation in question.... Legislative classification based on youth ... is clearly relevant to the state's *parens patriae* responsibilities toward minors.**

Douglas, 870 F.2d at 1246-1247 (emphasis added.). The court continued:

> The challenged statutory classification of minor children with permanent legal disabilities due to diminished mental capacity implicates the intersection of two characteristics, **which individually warrant only rational relationship review. The concurrence of these two characteristics does not change the Supreme**

Court's directive that age and mental capacity are often relevant statutory classifications which need only be rationally related to a legitimate state interest.

Id. at 1247 (emphasis added.).

Next, the court determined whether a rational relationship existed "between the classification of minors with permanent mental handicaps and the goals of the" Indiana statute. *Id.* The Indiana legislature enacted the medical malpractice statute of limitations "to address the concerns of rising medical costs and the need for comprehensive, affordable health coverage." *Id.* It also "sought to control the escalation of malpractice awards and concomitant increases in insurance premiums and health care costs by modifying the procedural rules for litigation." *Id.* at 1248. Relying on *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) and *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Seventh Circuit observed that "[i]n general, statutes of limitations provide a desired order and finality to the litigious process by way of an albeit arbitrary, but bright line." *Douglas, id.* The court then found that "[c]reating a shorter period of limitations in which to commence actions against health care providers is clearly a rational legislative response to the fiscal uncertainties in the health care industry." *Id.* While sympathetic to the parents and their child, the court was "compelled to find that the limits imposed by the malpractice statute of limitations are certainly rationally related to the stated goals of preventing stale claims and controlling the cost of medical care." *Id.* at 1249.

Here, the Petitioners challenge the Georgia statutes for classifying minors with medical malpractice claims differently from minors with other types of tort claims. Similar to the parents in *Douglas*, the Petitioners frame the statutory classification "by contrasting the general tolling statute of limitations with the more limited malpractice tolling period." *Id.* at 1245. *Douglas* and, more importantly, *Murgia* establish that statutory classifications based on age are subject to

"rational relationship review."[6] This level of scrutiny requires the Petitioners as the challenging party to show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993), *quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Therefore, the Petitioners must show that O.C.G.A. §§ 9-3-71 and 9-3-73 are not rationally related to a legitimate state interest, and in doing so must refute (1) the Georgia General Assembly's clearly stated objectives and (2) the Georgia Supreme Court's determinations that the subject statutes satisfy the applicable level of scrutiny.

O.C.G.A. § 9-3-71(a) provides a two-year statute of limitations for medical malpractice actions, and O.C.G.A. § 9-3-71(b) imposes a five-year statute of "ultimate repose and abrogation." *See* O.C.G.A. § 9-3-71(c). Prior to 1987, O.C.G.A. § 9-3-90(a) tolled the statutes of limitations and repose as they applied to a minor's cause of action for medical malpractice. *See Smith v. Cobb County-Kennestone Hospital Auth.*, 423 S.E.2d 235, 236 (Ga. 1992). However, in 1987 the Georgia General Assembly amended O.C.G.A. § 9-3-73 and "significantly

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6. Other federal circuit courts of appeals have applied the rational basis test in rejecting equal protection challenges to legislation creating classifications in the medical malpractice context. *See Gronne v. Abrams*, 793 F.2d 74, 77-78 (2nd Cir. 1986)(New York "statutory distinctions" between medical malpractice plaintiffs and other tort plaintiffs do not amount "to the sort of invidious discrimination prohibited by the fourteenth amendment"); *Montagino v. Canale*, 792 F.2d 554, 556-557 (5th Cir. 1986)(Louisiana medical malpractice statute of limitations "does not impinge on a fundamental right . . . or involve a suspect classification"); *Hoffman v. United States*, 767 F.2d 1431, 1435-1436 (9th Cir. 1985)(California statutory cap on noneconomic losses in medical malpractice cases "does not involve any suspect or quasi-suspect classification, a fundamental right, or a classification requiring a heightened scrutiny"); *Brubaker v. Cavanaugh*, 741 F.2d 318, 321 (10th Cir. 1984)(analyzing Kansas medical malpractice statute of limitations and finding "that a rational relation exists between the shorter limitation period for health care providers and the legitimate objective of providing quality health care in Kansas"); *DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287, 291-292 (4th Cir. 1980)(Virginia legislation found not to violate equal protection because "[t]he different treatment of medical malpractice plaintiffs from other tort plaintiffs is not a denial of equal protection, when the special problems posed by soaring insurance costs are considered").

restricted the period of disability that would toll the operation of O.C.G.A. § 9-3-71." *Smith, id.*

As amended, O.C.G.A. § 9-3-73(b) states that, notwithstanding the general tolling provision in O.C.G.A. § 9-3-90(a),

> all minors who have attained the age of five years shall be subject to the periods of limitations for actions for medical malpractice provided in this article [the two-year limitations period in O.C.G.A. § 9-3-71(a)]. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

O.C.G.A. § 9-3-73(c)(2)(A) and (B) require a medical malpractice action on behalf of a minor to be commenced before his tenth birthday if he was under the age of five on the date the malpractice occurred, or within five years from the date of the wrongful act if the minor was five or older on that date. O.C.G.A. § 9-3-73(b) is a statute of limitations for minors' medical malpractice claims; O.C.G.A. § 9-3-73(c) is a statute of repose. *See* O.C.G.A. § 9-3-73(d). The 1987 amendment also contained O.C.G.A. § 9-3-73(f), which states:

> The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

The Georgia Supreme Court has rejected several constitutional challenges to the post-1987 versions of O.C.G.A.

§§ 9-3-71 and 9-3-73. In *Smith, supra*, the court rejected an equal protection challenge to O.C.G.A. § 9-3-73(b). Applying a rational basis test, the court held "that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives," namely those stated in O.C.G.A. § 9-3-73(f). *Smith*, 423 S.E.2d at 239. In *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993), the plaintiff argued that O.C.G.A. § 9-3-71(b) denied him equal protection of the law because it "creates an arbitrary classification" of medical malpractice claimants. *Id.* at 309. In rejecting this argument, the court applied the rational basis test and identified multiple state interests furthered by O.C.G.A. § 9-3-71(b): "Because of the nature of the practice of medicine, uncertainty over the causes of illnesses and injury make it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause." *Id.* at 310. *Crowe v. Humana, Inc.*, 439 S.E.2d 654 (Ga. 1994) involved another equal protection attack on O.C.G.A. § 9-3-73(b). The plaintiffs, parents of a minor child, contended that "O.C.G.A. § 9-3-73(b) violates constitutional equal protection guarantees by excluding minors bringing medical malpractice actions from the general period of disability provided by O.C.G.A. § 9-3-90, and by establishing an arbitrary and unreasonable period of disability." *Id.* at 655. The court found that it already decided this issue adversely to the plaintiffs in *Smith, supra. Crowe, id.*

These decisions of the Georgia Supreme Court are consistent with this Court's determination in *Murgia* that the rational basis test applies to legislation containing age-based classification. Moreover, the Georgia General Assembly has identified rational, legitimate reasons for separately classifying minors for purposes of medical malpractice cases. *See* O.C.G.A. § 9-3-73(f); *Douglas*, 870 F.2d at 1248-1249. The Petitioners have pointed to no decisions of this Court that require a different result, and they certainly have not met their burden of showing why this Court should reject the Georgia General Assembly's "stated legislative objectives." Therefore, the Georgia Supreme

Court correctly held in this case (as well as in *Smith*, *Craven* and *Crowe*) that O.C.G.A. §§ 9-3-71 and 9-3-73 do not violate the equal protection clause of the Fourteenth Amendment.

B. Due Process

The Petitioners also challenge O.C.G.A. §§ 9-3-71 and 9-3-73 on due process grounds. They argue that due process requires a "discovery rule"[7] for limitations and repose purposes "where the patient has not discovered either the negligent act or the resultant injury." (Petition, p. 17.) In the medical malpractice context, Georgia law applies the discovery rule only to those situations where a foreign object is left in the patient: the limitations period does not begin to run until after discovery of the negligent act, i.e. the failure to remove or identify the foreign object. *See* O.C.G.A. § 9-3-72. For all other medical injuries, the statute of limitations begins to run at the first manifestation of an injury[8], and the statute of repose "runs from the date on which the negligent or wrongful act or omission occurred without regard to when the injury arising from the negligent or wrongful act or omission occurred or was discovered." *Christian v. Atha*, 598 S.E.2d 895, 896 (Ga. App. 2004). According to Petitioners, applying the discovery rule only to retained foreign object cases "is arbitrary, unconscionable and denies due process because patients, particularly minor ones, lack the competence and the education to discern when a medically negligent act has occurred, and children have no ability to ensure the protection of their rights by age seven or ten, as O.C.G.A. § 9-3-73 prescribes." (Petition, p. 11.)

The Seventh Circuit rejected a very similar argument in *Douglas, supra.* The plaintiffs there argued that "application of the occurrence rule which ties the running of the limitations

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7. Under this theory, the statutes of limitation and repose would not attach and begin to run until the plaintiff knew he was injured, could identify his injury *and* the cause of his injury.

8. The one exception occurs in cases of misdiagnosis of an existing condition, such as the case before this Court, when the statute of limitation attaches and begins to run on the date of the misdiagnosis. *See Kane v. Shoup*, 580 S.E.2d 555 (Ga. App. 2003).

period to the occurrence of the act or omission causing the injury denie[d] them access to court before they [were] aware of the existence of a cause of action." *Douglas*, 870 F.2d at 1249. The court began by dismissing the plaintiffs' premise "that due process requires the state to toll the statute of limitations for persons with legal disabilities such as minority or mental handicap." *Id.* States can modify general tolling provisions without violating due process, just as Indiana did in limiting the general tolling statute's applicability to product liability actions. *See* Ind. Code § 33-1-1.5-5. *Douglas, id.*

The plaintiffs also claimed that "due process requires an indefinite length of time" for filing medical malpractice actions, particularly since the general tolling statute preexisted the malpractice statute of limitations. *Id.* The court disagreed, holding that "a tolling statute, like any procedural rule, cannot vest plaintiffs with a substantive right in the continued protection of that rule." *Id. See also Chase Securities Corp. v. Donaldson*, 325 U.S. at 314 (1945). Again explaining that legislatures can modify procedural rules, the Seventh Circuit cited this Court's pronouncement in *Martinez v. California*, 444 U.S. 277, 282 (1980), "that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Douglas*, 870 F.2d at 1250.

The *Douglas* court concluded with what is essentially the Respondents' position in this case.

> As discussed *supra*, the malpractice statute of limitations is clearly rationally related to its goal of relieving the malpractice insurance crisis. It is the province of the Indiana legislature to allocate the increased cost of health care between the health care providers, insurance carriers and patients and to determine under what circumstances it is appropriate to delay the running of the statute of limitations in spite of the increased risk of lost evidence and lapse of memory. The state need not provide a tolling provision for minority and mental

> incompetence or a discovery rule in order to comply with the due process guarantees of a meaningful opportunity to be heard.

Id.

III. ***Contrary to Petitioners' Claims on Pages 9-10 and 19-30 of Their Petition, There Are Not Square Conflicts Between the Georgia Courts' Constitutional Analyses of its Medical Malpractice Statutes of Limitation and Repose and Other State and Federal Courts' Constitutional Analyses of Those Respective States' Medical Malpractice Statutes of Limitation and Repose.***

A. Cases cited by Petitioner as conflicting with Georgia courts' constitutional analyses of Georgia's statutes of limitation and repose are distinguishable as: (1) the relevant statutes cited in those cases are dissimilar to Georgia's statutes of limitation and repose; and (2) cases cited by Petitioner were held to be unconstitutional as a matter of state constitutional law, and not as a matter of federal constitutional law.

(1) The state statutes cited by Petitioners as "conceptually indistinguishable" (Petition, p. 9) from Georgia's statutes of limitations and repose are in fact dissimilar to Georgia's statutes in several ways: (a) most of the cited statutes of limitation attach and begin to run on the date of the negligent act, whereas O.C.G.A. §§ 9-3-71(a) and 9-3-73(b) do not attach and begin to run until an injury arising from a negligent act first manifests itself; (b) most of the cited statutes of repose have terms that are shorter than the five year term in O.C.G.A. § 9-3-71(b) and the five to ten year terms for minors in O.C.G.A. § 9-3-73(c); (c) health care providers can opt-in or opt-out of the protections of some of the limitations statutes which Petitioner cites; (d) these statutes are usually part of larger medical malpractice acts, the purposes of which are to create statutory medical malpractice insurance funds to cover those providers who opt-in to and pay fees to these statutorily created insurance funds; (e) the state and/or federal courts reviewing the majority of the limitations statutes Petitioners

cite found that the sole purpose of the legislation was to combat a perceived medical malpractice crisis, but they fail to take into consideration and to discuss the difficulties and consequences of litigating stale claims; (f) the prevention of stale claims is stressed as one of the stated objectives of the Georgia statutes, and the reasoning of the Georgia appellate courts in finding O.C.G.A. §§ 9-3-71 and 9-3-73 constitutional is heavily influenced by the undesirable alternative consequences of statutorily mandated litigation of stale claims which could conceivably result in tolling a minor's claim for as many as twenty-three years after the negligent act; and (g) at least one of the limitations/repose statutes Petitioners cite does not act as a limitation at all because the state courts decide whether or not to enforce the statute depending on the judges' subjective beliefs as to what may be reasonable or unreasonable under the circumstances of individual cases.

The statutes of limitation from New Mexico, South Dakota and Texas[9] which Petitioners allege to be indistinguishable from Georgia's statutes of limitation in O.C.G.A. §§ 9-3-71(a) and 9-3-73(b) (*See*, Petition, pp. 9, 19-21, 25, and 28-29), actually run from the date of the negligent act which is/can be much earlier than the point at which Georgia's statutes attach and begin to run; *i.e.*, from the date of the first manifestation of an injury. Furthermore, the statutes of repose in New Mexico, South Dakota, Texas, Utah, and Ohio,[10] which Petitioners allege to be indistinguishable from O.C.G.A. §§ 9-3-71(b) and 9-3-73(c), are actually shorter than the five year term set out in O.C.G.A. § 9-3-71(b) and the five to ten year terms set out in O.C.G.A. §9-3-73(c). Had the courts of these states had the opportunity to apply statutes of limitation and repose identical to Georgia's, which attach at the point when the injury first manifested itself (*See*, O.C.G.A. §§ 9-3-71(a) and 9-3-71(b)), and

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9. *See Jaramillo v. Heaton*, 100 P.3d 204, 206-207 (N.M. Ct. App. 2004), *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 770 (S.D. 1989), and *Sax v. Votteler*, 648 S.W.2d 661, 663 (Tex. 1983).

10. *See Jaramillo*, 100 P.3d at 206-207, 208; *Lyons*, 440 N.W.2d at 770; *Sax*, 648 S.W.2d at 663; *Lee v. Gaufin*, 867 P.2d 572, 574 (Utah 1993), *Schwan v. Riverside Methodist Hospital*, 452 N.E.2d 1337, 1338 (Ohio 1983), *Mominee v. Scherbarth*, 503 N.E. 2d 717, 719-720 (Ohio 1986).

which provide minors with a five to ten year period after the negligent act before the statute of repose abrogates their claims (*See* O.C.G.A. § 9-3-73(c)), the outcomes of these cited cases may well have been different.

Additionally, in New Mexico, health care providers can either opt-in to the protections of the state's three year statute of limitation/repose by paying $600,000.00 to the state superintendent of insurance and by making regular payments into the statutorily created insurance fund; or, if they choose not to invest these amounts, they do not get the protection of the three year statute of limitation/repose in the New Mexico Medical Malpractice Act.[11] Whereas, Georgia's medical malpractice statutes of limitation and repose apply to all licensed physicians in Georgia; nobody gets to "opt-in" or "opt-out". Furthermore, the New Mexico courts are not consistent in their application of the state's statute of limitation/repose as the courts may decide not to enforce the statute at all in any given situation depending on whether the judges think its effects would be "unreasonable" under the circumstances of the individual case.[12]

In the cases Petitioners cite from New Mexico, South Dakota, Texas, Utah, Ohio and Arizona, the purpose or objective given for each state's medical malpractice statutes of limitation and/or repose is primarily, if not completely, limited to addressing the perceived medical malpractice crisis facing that state or the nation as a whole.[13] The Petitioners expend a great deal of ink denouncing the validity of the states' use of their perceived medical malpractice crises as the basis for the implementation of their respective medical malpractice statutes of limitation and repose (*See* Petition, pp 21-23, 27 and 29); however neither the Petitioners nor the cited opinions

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11. *See the Medical Malpractice Act of New Mexico*, N.M.S.A. §§ 41-5-1 et seq.

12. *Jaramillo*, 100 P.3d at 207.

13. *See Jaramillo*, 100 P.3d at 208; N.M.S.A. § 41-5-2; *Lyons*, 440 N.W.2d at 771; *Sax*, 648 S.W.2d at 666; *Lee*, 867 P.2d at 576; *Schwann*, 452 N.E. 2d at 302; *Mominee*, 503 N.E.2d at 721; *and Kenyon v. Hammer*, 688 P.2d. 961, 964 (1984).

dedicate any amount of discussion to the consideration of the difficulties and consequences of litigating stale claims when determining whether the states' objectives are legitimate and whether the statutes in question are rationally related to those objectives. Whereas, prominent in the opinions of Georgia's appellate courts are the acknowledgments and discussions that the objectives of Georgia's medical malpractice statutes of limitation and repose are to avoid the difficulties and consequences of litigating stale claims.

The Georgia Supreme Court opined in *Allrid v. Emory University*, 285 S.E.2d 521 (Ga. 1982) and *Smith et al. v. Cobb County-Kennestone Hospital Authority*, 423 S.E.2d 235, 240 (Ga. 1992):

> Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

This Court may recognize these words and phrasing as they are almost identical to those in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944), and *Chase Securities Corp., v. Donaldson et al., Executors*, 325 U.S. 304, 314 (1945) concerning the purposes of limitations statutes. The *Chase* Court elaborated further:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [internal cite omitted]. They are by definition arbitrary, and their operation

> does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the *privilege to litigate.*

Chase, 325 U.S. at 314 (emphasis added).

In *Craven v. Lowndes County Hospital Authority*, 437 S.E.2d 308 (Ga. 1993), the Georgia Supreme Court reiterated its opinion that Georgia's medical malpractice statutes of limitation and repose were rationally related to the legitimate interest of the state in eliminating stale claims:

> This amounts to a recognition that the legislature may conclude that the time may arrive when past transgressions are no longer actionable. *The long history of such conclusions emphasizes their rationality.* From the biblical time of the Year of Jubilee to the present day, policymakers have exercised the right to "wipe the slate clean" after a fixed period of time. In doing this, there is a clear distinction between a statute of limitation "barring" an action, and a statute of repose providing for abolition of a cause of action after the passage of the time provided. We cannot say that the legislature acted irrationally when it amended the statute in question.

Craven, 437 S.E.2d at 31 (emphasis added).

In text, extent, intent and purpose, the medical malpractice statutes of limitation and repose Petitioners cite as being indistinguishable from O.C.G.A. §§ 9-3-71 and 9-3-73 are in fact very distinguishable as explained, *supra*; and the constitutional analyses of these allegedly similar statues can, therefore, only be different from the constitutional analyses of Georgia's statutes.

(2) Cases and their constitutional analyses cited by Petitioners as conflicting with Georgia's appellate courts' constitutional analyses of its medical malpractice statutes of limitation and repose were decided as a matter of state

constitutional law, and not as a matter of federal constitutional law.

There is no prohibition against a state constitution providing to its citizens rights and protections in addition to those provided by the U.S. Constitution. *Sax*, 648 S.W.2d at 664. The statutes cited from New Hampshire, South Dakota, Texas, Arizona, Utah and Ohio were all found to violate various provisions of those states' constitutions[14] which have no counterparts in the federal constitution. The courts either held that: the right to recovery for personal injury and/or the right to access to the courts were fundamental or important substantive rights under their constitutions; or that the states' constitutions included open courts provisions; or that the statutes created suspect or quasi-suspect classes; and therefore, the statutes in question had to undergo strict or elevated scrutiny to pass constitutional muster.[15] Georgia does not have similar additional provisions in its constitution, which instead tracks the U.S. Constitution. Therefore, since Georgia's statutes of limitation and repose do not impinge on a fundamental or important substantive right guaranteed by the federal constitution, and they do not involve a suspect or quasi-suspect class, they must only undergo rational basis scrutiny in order to be constitutional.[16]

B. Statutes of limitation and repose are exactly those types of legislation which may conflict from state to state because they are examples of social and economic legislation, for which the Equal Protection clause of the Fourteenth Amendment gives legislatures wide latitude to formulate.

Legislatures are given wide latitude in formulating social and economic legislation based on the individual state's goals

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14. *See Carson v. Maurer*, 424 A.2d 825, 831 (1980); *Lyons*, 440 N.W.2d at 770-772; *Sax*, 648 S.W.2d at 664-667; *Kenyan*, 688 P.2d at 968-975; *Lee*, 867 P.2d at 577-589; *Schwann*, 452 N.E.2d at 301-303; *and Mominee*, 503 N.E.2d at 720-722.

15. *Id.*

16. *City of New Orleans*, 427 U.S. at 303.

and governmental interests.[17] Courts are reluctant, as they should be in our federal system with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. *City of Cleburne*, 473 U.S. at 441. To be constitutional, the Equal Protection Clause requires only a rational means to serve a legitimate end. *Id.*, at 442. Courts must refrain from acting as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in the legislative sphere. *Houk v. Furman*, 613 F.Supp. 1022, 1030 (1985) *citing City of New Orleans*, 427 U.S. at 303; see also, *Martinez*, 444 U.S. at 283 ("As federal judges we have no authority to pass judgment on the wisdom of the [legislature's] underlying policy determination").

Because of the wide latitude given in formulating social and economic legislation, it is not a surprise that states may address similar problems with widely varying legislation, or that they may use similar legislation to address very different problems. Regardless, these statutes are presumed valid and not in violation of the equal protection clause or the due process clause of the Fourteenth Amendment to the U.S. Constitution as long as they do not concern a suspect class or a fundamental right or gender or illegitimacy, and they must be rationally related to a legitimate governmental interest.[18] In order to make this determination the courts must answer two questions: (1) Does the legislation have a legitimate purpose; and (2) Was it reasonable for lawmakers to believe that implementation of the statutes in question would promote that legitimate purpose.

The main underlying purpose of Georgia's medical malpractice statutes of limitation and repose is the prevention and elimination of stale claims, which has been found by the state supreme court to be a legitimate governmental interest, as discussed previously. Moreover, this Court in *Chase* and *Order of Railroad Telegraphers* has recognized the prevention and elimination of stale claims as a legitimate governmental

17. *City of Cleburne*, 473 U.S. at 440.

18. *City of New Orleans*, id.

interest; most, if not all, state and federal courts would be hard-pressed to disagree.

In response to the second question involved in rational basis scrutiny, it was and is certainly reasonable for Georgia lawmakers to believe that a two year statute of limitation for medical malpractice claims of adults and minors over the age of five, would promote the legitimate objective of eliminating stale claims; especially when the alternative suggested by Petitioners would allow minors to wait as many as twenty years to bring a claim, at which time the disability of minority would be removed.[19] Likewise, it was and is certainly reasonable for Georgia lawmakers to believe that the five year statute of repose for adults and minors age five and older, and the repose statute for minors injured prior to age five which does not expire until the minor's tenth birthday, would promote the legitimate purpose of eliminating state claims; especially when the alternative for minors suggested by the Petitioners would be to toll the five year statute of repose until the child reaches majority, which could conceivably allow as many as twenty-three years to pass before the minor's cause of action would be abolished. In this amount of time memories will no doubt fade, witnesses will disappear and/or die, and evidence will most definitely be lost, making the successful pursuit and/or defense of that claim almost impossible for either the plaintiff or the defendant.

Georgia's interest in preventing and eliminating stale claims is legitimate, and its medical malpractice statutes of limitation and repose rationally promote that interest. These statutes do not involve suspect classes, fundamental rights, or issues of gender or illegitimacy, therefore they must only survive rational basis scrutiny to be constitutional. As demonstrated by Respondents' brief, *supra*, Georgia's medical malpractice statutes of limitation and repose are constitutional, and Petitioners' premature petition for certiorari should be denied.

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19. Majority status in Georgia is eighteen years old. Therefore, if the two year statute of limitation is determined to be tolled until a minor turns eighteen, then it is possible that twenty years could elapse before a minor is required to file his claim.

CONCLUSION

The Petition does not warrant review. The Petitioners cannot establish that this Court has jurisdiction under 28 U.S.C. §1257(a) in order to address the constitutional challenges raised by Petitioners. In fact, the Respondents have affirmatively shown the lack of any such jurisdiction. Nor can the Petitioners carry their burden of showing that the Georgia statutes are unconstitutional. The Respondents have shown that the rational basis test applies to the statutes and that the Georgia legislature and judiciary have identified legitimate justifications for the statutory classification. And, the Respondents have further demonstrated that there is no true conflict among the state courts in this country in their analyses of their respective statutes of repose and limitations. For these reasons, Respondents respectfully urge this Court to deny Petitioners' Petition.

Respectfully submitted,

WILLIAM P. FRANKLIN, JR.
LESLIE PICKETT SHEEHAN
OLIVER MANER & GRAY LLP
P.O. Box 10186
Savannah, GA 31412
Attorneys for Respondent Ayman Al-Jabi, M.D.

JAMES S. V. WESTON
HULL, TOWILL, NORMAN, BARRETT & SALLEY
P.O. Box 1564
Augusta, GA 30903-1564
Attorneys for Respondent MCG Health, Inc.

ADAM L. APPEL*
KIM M. RUDER
CARLOCK COPELAND SEMLER & STAIR, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, GA 30303
(404) 522-8220
Attorneys for Respondent Sharon J. Kaminer, M.D.

* *Counsel of Record*

(4)

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IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

REPLY BRIEF

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

203234

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondent Board of Regents filed a Response to the Petition on August 25, 2006 and the remaining respondents (collectively the "Al-Jabi" respondents) filed a consolidated Response the same date. Both briefs first address the question of whether the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a) and then address the merits of the Petition. Petitioners file this Reply to both briefs, addressing the question of jurisdiction and briefly replying to the challenge to the merits of the Petition.

The claims of petitioner Derek Canas span a period of time commencing in the first quarter of 1985 when he received an HIV contaminated blood transfusion at The Medical College of Georgia ("MCG") and in ending in April 2001, when he was diagnosed with AIDS. This litigation commenced on December 28, 2001, against two treating physicians who had seen and treated Derek for a period of seven to ten years and was amended on February 7, 2003, to add the owners and operators of MCG, whose staff physicians had seen or treated the child for a period of almost 16 years. Derek Canas attained the age of majority on November 1, 2002.

I. The Proceedings Below Have Produced a Final and Reviewable Order under 28 U.S.C. § 1257(a) and this Court May Properly Exercise Jurisdiction.

A. The Supreme Court of Georgia Order Meets Finality Criteria Notwithstanding Further Proceedings in Georgia.

When the Supreme Court of Georgia refused to hear Petitioners' direct appeal of the trial court's orders in its order dated February 27, 2006 (Appendix A), it expressly found

that the constitutional challenges raised by the Petitioners had been adversely adjudicated and cited specific cases. In their motion for reconsideration, Petitioners not only challenged the holdings in those cases, but advanced in substance the arguments made in their Petition here, citing relevant cases from other jurisdictions which reached contrary conclusions with respect to conceptually indistinguishable statutes.

Respondents opposed petitioners' motion for reconsideration in the Supreme Court of Georgia on the constitutional merits. No respondent suggested that the constitutional issues had not been timely or properly raised in the trial court. The trial court's order in Appendix D states on its face that the constitutional questions were properly raised and an order in the Georgia Court of Appeals dated November 2, 2005 (Appendix E) further makes the point that there was a timely direct appeal of the trial court orders to the Supreme Court of Georgia which has exclusive jurisdiction to hear those issues.

After the case was transferred to the Georgia Court of Appeals, Board of Regents stated in their brief to that court:

> By transferring this appeal, asserting that these statutes are unconstitutional, to this Court, the Supreme of Georgia has determined the law of the case under [O.C.G.A] § 9-11-60(h) that §9-3-73 does not violate the constitutional guarantees of equal protection or due process. *Egerton v. Jolly*, 133 Ga. App. 805, 806 (1975)[212 S.E. 2d 462].

(Board of Regents Georgia Court of Appeals Brief at p.5). The cited statute O.C.G.A. § 9-11-60(h) provides that "any ruling by the Supreme Court . . . in a case shall be binding in

all subsequent proceedings in that case in the lower court and in the Supreme Court .. ." Respondent Al-Jabi in his brief filed in that same court similarly stated as follows:

> The transfer of the appeal by the Supreme Court to the Court of Appeals is a final determination that no constitutional question was properly raised or meritorious. *Egerton v. Jolly*, 133 Ga. App. 805. 806 (1975).

(Al-Jabi Court of Appeals Brief at p. 11-12). The other respondents took "me too" positions. Claims of the Al-Jabi respondents that Petitioners have further recourse to another appeal to the Supreme Court of Georgia on the constitutional questions are rebutted by their own arguments in the Georgia Court of Appeals and by the statute quoted above by the Board of Regents. Having argued to the Georgia Court of Appeals that the Order of the Supreme Court of Georgia was in fact a "final determination" of the constitutional issues, Respondents' argument here that the Supreme Court of Georgia Order of February 27, 2006 is *not* a final order as would allow this court to accept jurisdiction under 28 U.S.C. § 1257(a)[1] is disingenuous. Respondents simply seek to interpose an unwarranted procedural obstacle to a ruling on the constitutional merits.

The statutes challenged here dictate the rules of engagement which will govern a lengthy trial involving more than a dozen medical professionals and administrators with statutory constraints on both the period of negligent acts (5 years) and the period of injuries (2 years) at issue. However, if the challenged statutes are unconstitutional, then the tolling provision under O.C.G.A. § 9-3-90 would apply

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1. Petitioners acknowledge that to avoid any later waiver argument they continue to to preserve the constitutional questions raised here in every appellate brief.

in this case as it does to other tort claims brought by minors, such that all of the claims of petitioner Derek Canas would be tolled and no statute of limitations or repose would begin to run until he attained the age of majority on November 1, 2002. This was the stated effect of actions taken by the New Hampshire Supreme Court in *Carson v. Maurer*, 424 A.2d (N.H. 1980) and the Ohio Supreme Court in *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986) in striking down comparable statutes. There would then be no wasteful trial of improperly truncated claims.

Because the Supreme Court of Georgia has held that neither non-discovery, fraud nor anything else tolls the statute of repose, *Simmons v. Sonyika*, 614 S.E.2d. 27, 30 (Ga. 2005), and considers the constitutional question decided, there is no trial court *scenario* which would allow Derek Canas to put at issue the negligent acts of the respondents dating back more than five years, absent a prior determination that the statute of repose as written or applied denies him equal protection and due process of law. If the time constraints of the statutes are unconstitutional, and the Order of the Supreme Court of Georgia has foreclosed further consideration of that issue, as respondents have argued to the Georgia Court of Appeals, then a complex trial involving weeks of professional testimony would be a potential nullity. That is so because it would take place under unconstitutional rules of engagement unless this Court affirms the holding of the Supreme Court of Georgia on the constitutional issues raised. Absent that ruling or a denial of certiorari here, Petitioners face a lengthy trial, and may prevail, but only on improperly truncated claims, or Petitioners may lose. Either outcome portends a further attempt to gain appellate review of the same constitutional issues presented here. If Petitioners' efforts were successful, then yet another trial with all of the attendant delays and expense would inevitably follow. This case even now will have been pending at least

five years before any trial takes place. Only a trial with a *prior* determination of the constitutional issues will avoid further protracted proceedings. Forcing a litigant to go to trial with an unresolved constitutional question affecting the outcome on the merits would itself strain precepts of due process.

B. Respondents Misconstrue *Cox Broadcasting.*

All parties point to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) as providing the platform for review of a judgment or decree of the higher state court where further proceedings may be pending. In that case this Court noted "its past pragmatic approach in determining finality. . . ." *Id.* at 470. The court then delineated "at least four categories" of cases where review might be undertaken notwithstanding the possibility of ongoing state court litigation, after first identifying the threshold consideration:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid the 'mischief of economic waste and of delayed justice.'

Id. at 477-78. The Court's threshold test is met here and the listed categories are not exhaustive as evidenced by the use of the words "at least." The only federal question here concerns the constitutionality of the Georgia medical malpractice statutes of limitations/repose. Left unanswered, the mischief which ensues is a trial limited to evidence of medically negligent acts spanning five years and injuries spanning two. That trial would be an enormous waste if in fact the statutes are unconstitutional. If the statutes are

unconstitutional, Derek Canas' claims were tolled until he reached age of majority [O.C.G.A. § 9-3-90] and all negligent acts and all injuries throughout his childhood caused by Respondents would be at issue.

A significant consideration identified in *Cox Broadcasting* is whether "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice . . ." *Id.* at 477. In the first category, the Court cited *Mills v. Alabama*, 384 U.S. 214 (1966), where jurisdiction was retained "to avoid an inexcusable delay . . . a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.* at 479. This case falls within the first category since the resolution of the federal issue will conclusively determine whether any of Petitioners claims are barred by the challenged statutes, because if not, all claims were timely asserted within two years of Derek Canas attaining the age of majority. The constitutional questions must be answered on the merits prior to trial to assure a trial on the merits.

The Court's decision in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963) cited in *Cox Broadcasting* also provides an analogous set of circumstances. There, the Court exercised jurisdiction to review a Texas Supreme Court ruling on competing state and federal venue statutes, which differed as to where two national banks could be sued. The Court reviewed the matter because it was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 484. The consequence of not reviewing the case would have been to subject the litigants to "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*

As Respondents have suggested to the Georgia Court of Appeals, because the Supreme Court of Georgia has previously decided that the statutes challenged here are constitutional, both in multiple prior cases and again in this one, the constitutional issues are not again reviewable by Georgia courts prior to trial; yet, it is imperative that there be a decision on the constitutional merits of these statutes prior to trial to assure its validity. Pretending that the Supreme Court of Georgia will review the constitutional question further, after it has persistently refused to do so, elevates futile procedural formalities to new heights.

II. There Are Clear Conflicts in Equal Protection and Due Process Analysis of Conceptually Indistinguishable Statutes.

The Al-Jabi respondents call the Court's attention to *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989). In that case, the Seventh Circuit upheld Indiana's two year medical malpractice statute of limitations and would not apply heightened scrutiny to a minor's claim. That approach differs from the approach taken by the Second Circuit in *Ramos v. Town of Vernon*, 353 F.3d 171 (2nd Cir. 2003), which applied heightened scrutiny to an ordinance curtailing the rights of children, albeit not in a medical malpractice case. Notably, the Indiana Supreme Court in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), a decade after the *Douglas* decision, held the successor statute (validated in *Douglas)* unconstitutional under state constitutional law, as applied to a breast cancer victim. The plaintiff, it was held, did not know and could not have discovered in the exercise of reasonable diligence that she had sustained a medical malpractice injury more than two years prior to bringing a lawsuit and the claim would have been barred under the Indiana statute of limitations, had it not been found unconstitutional in its application.

While the *Martin* case was not decided under the Fourteenth Amendment, it serves to illustrate two important points. First,

many comparable statutes upheld by other courts [and relied upon by Respondents] often are accompanied by case law in those states upholding a discovery rule or a continuing treatment rule so that "blameless ignorance" does not bar a bona fide claim. The absence of a discovery rule in *Martin* left Indiana's statute unconstitutional under that state's constitution in its application. Second, *Martin* illustrates why the Georgia statutes are both irrational and arbitrary. Patients routinely do not know when they have been subjected to an act of medical negligence and the onset of a discernible injury from an unknown mis-diagnosis may not occur within the statutory period. *Martin* determined that the Indiana statute of limitations was unconstitutional in its application to an injury discovered outside the limitations period. *Even if the Georgia statutes were facially constitutional, they could not be applied here to Petitioners' claims in a manner consistent with due process.*

Respondents, in pointing out states where such statutes have passed constitutional muster, completely ignore the fact that many apply a discovery or similar rule to assure that latent claims are not barred.[2] Georgia has no comparable provision or common

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2. *See, e.g., Jones v. McDonald*, 631 So.2d 869 (Ala. 1993) (discovery rule applies); *Pastchol v. St. Paul Fire & Marine Ins. Co.*, 929 S.W.2d 713 (Ark. 1996)(continuous treatment doctrine tolled statute of limitation); *Blanchette v. Barrett*, 640 A.2d 74 (Conn. 1994)(statute of repose may be tolled under continuous treatment doctrine or continuous course of conduct doctrine); *Benge v. Davis*, 553 A.2d 1180 (Del. Sup. 1989)(statute of limitation began to run on date of physician's last treatment of patient); *Anderson v. George*, 717 A.2d 876 (D.C. 1998) (continuous treatment doctrine applicable); *Flores Cruz v. Avon Products, Inc.*, 693 F. Supp. 1314 (D.C. P.R. 1988); *Cunningham v. Huffman*, 609 N.E.2d 321 (Ill. 1993)(plaintiff not barred by statute of repose from ongoing course of continuous negligent treatment); *Walters v. Rinker*, 520 N.E.2d 468 (Ind. App. 1988); *Protective Life Ins. Co v. Sullivan*, 682 N.E.2d 624 (Mass. 1997)(applying discovery rule); *Doe v. American Nat. Red Cross*, 923 F. Supp. 753 (D. Md. 1996)(applying discovery rule); *Amrhein v. Petachenko*, 435 N.W.2d 10 (Mich. App.

(Cont'd)

law to protect minors or patients from these statutes which have no savings feature on their face. Yet, Georgia routinely protects the rights of minors in other than medical cases, otherwise starts a tort clock running when a cause of action accrues (embracing a discovery rule), and even employs a continuing tort concept in other contexts. Respondents' reliance on other states which have upheld the constitutionality of such statutes is misplaced, absent a concurrent analysis of whether those states employ a discovery rule or other savings provision to ensure that patient claims are not voided simply because they are undiscovered within a prescribed period of limitations. That analysis, not surprisingly, is missing from their briefs. Suffice it to say that there are numerous contradictory constitutional results construing conceptually indistinguishable statutes, and the cases

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1988); *Chizmadia v. Smiley's Point Clinic*, 428 N.W.2d 459 (Minn. App. 1988); *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191 (Mo. 2001)(continuing care exception to statute of limitation applied); *Stallings v. Gunter*, 394 S.E.2d 212 (N.C. App. 1990)(applying continuing course of treatment doctrine); *Frezell v. Iwersen*, 436 N.W.2d 194 (Neb. 1989) (action accrues when plaintiff discovers the malpractice or the resulting injury); *Troum v. Newark Beth Israel Medical Ctr.* , 768 A.2d 177 (N.J. Super. 2001)(cause of action began to run upon discovery that patient was HIV positive as a result of another's fault); *Borgia v. New York*, 187 N.E.2d 777 (N.Y. 1962)(applying continuing treatment doctrine); *Frysinger v. Leech*, 512 N.E.2d 337 (Ohio App. 1991)(commencement of statute of limitations is delayed until patient terminated relationship with physician); *Hotelling v. Walther*, 130 P.2d 944 (Ore. 1942); *Haggart v. Cho*, 703 A.2d 522 (Pa. Super. Ct. 1997)(discovery rule applies to determine date when patient could reasonably be expected to know of his injury); *Liffengren v. Bendt*, 2000 S.D. 91, 612 N.W.2d 629 (2000)(recognizing the continuous treatment rule); *Stanbury v. Bacardi*, 953 S.W.2d 671 (Tenn.1997)(adopting discovery rule); *Wilson v. Korthauer*, 21 S.W.3d 573 (Tex. App. 2000); *Farley v. Goode*, 252 S.E.2d 594 (Va. 1979); *Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55 (Wis. 1982); *Metzger v. Kalke*, 709 P.2d 414 (Wyo. 1985)(adopting the continuous treatment rule in medical malpractice cases).

cited by Petitioners employed equal protection or due process analysis tracking federal analysis to overturn comparable statutes.

There are two overriding and recurring themes premised on irrefutable logic in cases overturning comparable statutes: (1) Children who lack the capacity and ability to protect their legal rights in other contexts, as state laws routinely provide, cannot be rationally empowered by any legislature with that capacity only in claims against doctors; and (2) statutes of limitations/repose may not rationally start to run on latent or undiscovered negligent acts or injuries. Finally, Respondents claimed rational basis for these special medical statutes, namely that medical claims are somehow more prone to "staleness" than other injury claims of minors, has a hollow ring when medical care and treatment is routinely and carefully dated, documented and recorded. The goal of avoiding stale medical claims in Georgia cannot be rationally achieved by starting a statutory clock in cases where parents, patients and children cannot and do not know it is running.

CONCLUSION

Petitioners respectfully pray that the Supreme Court of the United States exercise jurisdiction and grant the Writ of Certiorari.

Respectfully submitted,

J. Robert Persons
Carter & Ansley LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners